Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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383 MADISON ASSOCIATES,
Petitioner,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

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PETITION FOR A WRIT OF CERTIORARI

WILLIAM T. COLEMAN, JR.
Counsel of Record
DEBRA A. VALENTINE
HILARY R. HEGENER
O'MELVENY & MYERS
555 13th Street, N.W.
Suite 500 West
Washington, D.C. 20004
(202) 383-5325
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

The 1967 landmark designation of Grand Central Terminal deprived its owners of 1.7 million square feet of existing development rights. To avoid a constitutional taking claim, New York City amended its Zoning Resolution in 1969 to allow unused development rights to be transferred to any property then linked to the landmark site by a series of lots having the same ownership as the landmark site. In 1969, 383 Madison Avenue was admittedly an eligible receiving site for these transferable development rights ("TDRs"). Petitioner is the owner by purchase of 1.5 million square feet of the Terminal's TDRs. New York City denied Petitioner's application to use 800,000 of these TDRs at its 383 Madison Avenue site. The state court upheld the denial based on its conclusion that (1) a permit seeker has no property interest to protect from unconstitutional invasion, (2) the 383 Madison Avenue site no longer qualified as a receiving site since years after 1969 an intervening lot was sold to a third party, and (3) the development proposal would exceed an arbitrary bulk limitation. The court below ignored Petitioner's interest in its property right—the TDRs—and instead focused on whether 383 Madison had an absolute right to the permit. Moreover, neither the arbitrary bulk limitation, which the City's own Zoning Resolution precludes, nor the same ownership requirement, as applied, bear any relationship to a legitimate state purpose. The Questions Presented, therefore, are:

(1) Whether Petitioner has a constitutionally protected property interest in the Terminal TDRs, such that application of permit conditions to those TDRs raises constitutional questions.

(2) Whether the City's denial of Petitioner's permit application constituted a taking by impermissibly burdening the use of the TDRs without

substantially advancing a legitimate government interest.

(3) Whether the City's denial of Petitioner's permit application violated substantive due process because it was based on conditions not reasonably related to a legitimate government interest.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

Petitioner is 383 Madison Associates, a New York limited partnership.

Respondents are the City of New York, the New York City Planning Commission, the New York Landmarks Preservation Commission, Sylvia Deutsch, Denise M. Scheinberg, Salvatore C. Gagliardo, Marilyn Mammano, William Garrison McNeil, and Daniel T. Scannell.

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PETITION FOR A WRIT OF CERTIORARI

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383 Madison Associates (hereafter "383 Madison" or "383") respectfully petitions for a writ of certiorari to review the judgment of the New York Supreme Court, Appellate Division, First Department, in this case.

OPINIONS BELOW

The order of the New York Court of Appeals denying 383 Madison's appeal as of right, dated September 14, 1993, is reported at 82 N.Y.2d 748. That court's January 11, 1994 decision denying 383's appeal by permission has not yet been reported. These decisions are reprinted in the attached Appendix [1] at 47a and 48a, respectively.

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[1] Page citations to materials in the Appendix appear as "—a."

The Supreme Court, Appellate Division, First Department entered its decision and order on May 20, 1993. The decision was reported at 193 A.D.2d 518 and is reprinted in the Appendix at 1a.

The November 1, 1991 order and judgment of the Supreme Court, New York County, and the underlying decision of August 6, 1991 were not reported and are reprinted in the Appendix at 5a and 10a, respectively.

JURISDICTION

On September 14, 1993, the New York Court of Appeals entered its judgment denying 383 Madison's appeal as of right from a decision by the New York Supreme Court, Appellate Division, First Department. On Novemvember 3, 1993, 383 Madison sought leave from the New York Court of Appeals to appeal by permission. While the latter motion was under consideration, Justice Thomas, on December 1, 1993, granted 383 Madison's application for an extension of time within which to file a petition for a writ of certiorari. Pursuant to Justice Thomas' order, the time within which to file was extended to February 11, 1994. On January 11, 1994, the New York Court of Appeals entered its judgment denying 383's appeal by permission. The jurisdiction of this Court to review the judgment of the New York Supreme Court, Appellate Division, First Department, is invoked under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment V; Amendment XIV, § 1.

New York City Administrative Code, Title XXV, ch. 3 (1986) ("Landmarks Preservation Law").

Zoning Resolution of the City of New York §§ 74-79, 74-791, 74-792, 81-211 and 81-212.

The relevant regulatory provisions are set out in the Appendix at 49a-56a.

STATEMENT

A. The Penn Central Litigation.

In 1967, the City of New York (hereafter "City"), pursuant to its Landmarks Preservation Law, N.Y.C. Admin. Code, ch. 3, § 25-301 *et seq.* (1986), designated Grand Central Station and its Station Lot (together "Terminal") landmarks. This Court has previously found that "[w]hile the [Landmarks Preservation] law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a 'reasonable return' on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 110 (1978) ("*Penn Central*"). This landmark designation, however, severely restricted the Terminal owners' prospects for further developing their prime midtown commercial site, which had been eligible for roughly 1.7 million square feet of additional development as of right under the applicable zoning ordinances. In response to protests by the Terminal owners that the landmark designation had "taken" this lucrative development right for public use without just compensation, the City amended its Zoning Resolution. Under the terms of the new provisions, ZR §§ 74-79, 74-791, 74-792, and 74-793,[2] the Terminal received as compensation approximately 1.7 million transferable development rights ("TDRs"). *See* Stipulation, *Penn Central Transp. Co. v. New York City*, Index No. 14763/69 (Sup. Ct. N.Y. Co., 1974), *rev'd* 50 A.D.2d 265 (1st Dep't 1975), *aff'd* 42 N.Y.2d 324 (1977), *aff'd* 438 U.S. 104 (1978).

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[2] Zoning Resolution § 74-793 establishes the requirements for the instrument of transfer and is not at issue in this case.

The TDR system is designed to compensate landmark owners by granting them the right to develop on nearby properties the square footage denied them by the landmark designation. (49a). Each TDR represents the right to surpass applicable zoning limits on neighboring properties by one square foot. TDRs are, therefore, valueless unless they are freely alienable or transferable to third parties for use at nearby "receiving" sites. However, unlike development as of right—such as would have been available at the Grand Central Terminal site prior to its landmark designation—development through the use of TDRs is heavily burdened with regulatory conditions that, if not applied fairly and for legitimate reasons, diminish the utility and hence the value of the TDRs.

The 1968 Zoning Resolution amendments that created TDRs not only limited the number of potential receiving sites, but also circumscribed TDR use at those sites. Specifically, pursuant to ZR § 74-79, the City limited TDR transfers to physically "adjacent lots"—that is, lots contiguous, directly across a street or cater-corner to the landmark. Pursuant to ZR § 74-791, the City created a special permit process to vet TDR use.[8]

Further limits on TDR use were incorporated in ZR § 74-792. Under this section, the City (1) imposed a twenty percent cap on the amount of floor space that could be added to a site eligible to use the Terminal TDRs (ZR § 74-792(2)(d)), (2) made approval of TDR use subject to a City finding that such use "will not unduly increase the bulk of any new development, density of population or intensity use of any block" (ZR

[8] When the State of New York passed the State Environmental Quality Review Act ("SEQRA") in 1975, which requires the preparation of an Environmental Impact Statement ("EIS") to evaluate the environmental effects of a proposed development, the EIS was made a component of the special review process. N.Y. Envtl. Conserv. Law § 8-0101 *et seq.* (1988).

§ 74-792(5)(a)), and (3) conditioned TDR use on a City finding that the applicant has in place a "program for continuing maintenance [that] will result in the preservation of the landmark" (ZR § 74-792(5)(b)).[4]

Convinced that the Landmarks Preservation Law and its accompanying regulations created a system that would never serve its supposed compensatory end, the Terminal owners sued the City in the Supreme Court of the State of New York, County of New York (hereafter "New York Supreme Court"). The complaint, filed October 7, 1969, alleged, *inter alia*, that the landmark designation constituted a violation of due process and a taking.

Bowing to these allegations, in 1969, the City crafted two amendments to its Zoning Resolution, each of which aimed to increase the eligible market for and hence the compensatory value of the TDRs. The first amendment expanded the definition of "adjacent lot" so as to include lots then linked to the landmark (*e.g.*, the Terminal) by a series of lots having the "same ownership"—as well as lots contiguous to or opposite them (hereafter "Chain Amendment"). ZR § 74-79 (49a-50a). The second amendment repealed the previously enacted restriction that capped TDR use at twenty percent of the floor area developable "as of right." ZR § 74-792 (50a-51a).

Throughout the *Penn Central* litigation, the City touted these 1969 amendments, stating, "[t]he 1969 amendments to the Zoning Resolution were expressly intended to expand the number of sites that could receive transfers of development rights from the Grand Central Terminal site." Brief for Appellees' at 31, *Penn Central Transp.*

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[4] In 1982, the City added a further condition requiring the City Planning Commission ("CPC") to establish

> that any disadvantages to the surrounding area caused by reduced access of light and air will be more than offset by the advantages of the landmark's preservation to the local community and the City as a whole . . .

ZR § 74-792(5)(2). *See* 51a.

Co. v. New York City, 438 U.S. 104 (1978) (No. 77-444). To give substance to its claims, the City emphasized that, due to the repeal of the floor cap, "approval was almost certainly forthcoming," *id.* at 32, for the imminent sale and use of 1.3 million TDRs (almost twice the amount and bulk at issue here) at the site of the former Biltmore Hotel, two blocks from the 383 Madison Avenue site involved in this case.

This display of civic expansiveness prevailed. In 1978, this Court held that the landmark designation of the Terminal was not a taking. 438 U.S. 104. The majority noted that "the class of recipient lots was expanded" by the 1969 amendments and observed that "at least eight" midtown properties "are eligible to be recipients of development rights afforded the Terminal by virtue of landmark designation." *Id.* at 115. The Court took particular note of the fact that the 1969 amendments permitted, "in highly commercialized areas like midtown Manhattan, the transfer of all unused [Terminal] development rights to a *single* parcel." *Id.* at 114-115 (citation omitted) (emphasis added).[5] These assumptions led the Court to term the Terminal TDRs "valuable" "rights." *Id.* at 137. But then came reality.

B. 383 Madison's Special Permit Application.

The regulatory framework that this Court optimistically assumed would allow for ready transferability of the Terminal TDRs has not met expectations. Virtually all of the development potential represented by the Terminal TDRs has languished for the past fifteen years, in spite of serious efforts to use them at nearby sites. The City's treatment of the Terminal TDRs has mocked the

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[5] In ZR § 81-211, the City subsequently formalized its expressed policy of allowing all TDRs to be added to a single building on an adjacent lot. That section expressly states that there is "No limit" on TDR use at a single site. (55a). In addition, ZR § 81-212 states that the "No limit" policy supersedes the "bulk and density" criterion in ZR 74-792(5)(a). (56a).

Penn Central Court's fundamental assumptions and eviscerated these "valuable" "rights."

Since 1983, when it purchased 1.5 million TDRs from the owners of Grand Central Terminal, 383 Madison has been caught in the City's regulatory web. In 1986, 383 Madison and the Terminal owners applied to the City Planning Commission ("CPC") for a permit to transfer approximately 800,000 Terminal TDRs to the 383 Madison Avenue site, an eligible "adjacent lot" when the Chain Amendment was passed. Three years later, after multiple and costly obstructions and delays, the City denied 383's permit application. (New York City Planning Comm'n Rep. No. C 870193 ZSM (August 23, 1989)) (21a). The City found that the 383 Madison Avenue site was no longer an eligible "adjacent lot" because Penn Central, years after the 1969 amendments, had broken the chain of common ownership by selling one or more of the surface lots between 383 Madison Avenue and the Terminal, although Penn Central retained title to the subsurface fees. (44a). The City also found that 383's proposal (1) would unduly increase the bulk and density of population; (2) lacked an adequate program to preserve the landmark; and (3) would have a disproportionate impact on access of surrounding sites to light and air. (44a-45a).

C. Proceedings Below.

On August 24, 1989, 383 filed a claim for $480 million in damages with the Comptroller for the City of New York. When the City failed to timely respond, 383 initiated this action by filing a complaint in the Supreme Court of the State of New York. 383 alleged, *inter alia*, that the City's refusal to permit the use of Terminal TDRs at 383 Madison Avenue had, under the circumstances of this case, effected an unconstitutional taking and a deprivation of property without substantive or procedural due

process of law. Complaint of 383 Madison Associates, *383 Madison Assoc's v. City of New York*, (N.Y. Sup. Ct., N.Y. Co., Oct. 30, 1989) (Index No. 23621/89).

On November 1, 1991, the trial court entered its order and judgment, which affirmed the City's decision. The court concluded that the City's administrative findings had a "rational basis" and were not "arbitrary and capricious.' (8a-9a). The court cursorily rejected 383's constitutional challenges.

On appeal, the Appellate Division rejected as lacking a "rational basis" the lower court's findings that 383 Madison's plans (1) would unduly increase the density of population; (2) lacked an adequate program to preserve the Terminal; and (3) would unduly impact the access of surrounding sites to light and air. (3a). The Appellate Division upheld, under rational basis scrutiny, only the City's interpretation of the "adjacent lot" provision and the "unduly increase" bulk provision, as applied. On these bases, the court affirmed the City's ultimate decision. (2a). In upholding the decision below, the Appellate Division dismissed 383's constitutional arguments, stating that "since [383 Madison] did not have a property right to the grant of a special permit, their [sic] constitutional claims must be rejected." (3a-4a).

On June 21, 1993, 383 Madison noticed an appeal as of right to the New York Court of Appeals. Following *sua sponte* review, the Court of Appeals denied the appeal by order dated September 14, 1993. (47a). Petitioner's subsequent appeal by permission was denied by order dated January 11, 1994. (48a).

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION.

This case, which has ties to this Court's 1978 *Penn Central* decision, presents important takings issues that the New York state courts dismissed in a way that conflicts with prior applicable decisions of this Court. It also presents important questions concerning the application of substantive due process scrutiny to land regulation cases that have not been, but should be, settled by this Court.

In *Penn Central*, this Court recognized that TDRs were "valuable" "rights." 438 U.S. at 137. But in this case, the New York state courts have ignored the constitutional impact of that pronouncement by focusing, not on the property owner's right in the TDRs, but on whether the TDR owner has a right to the special permit that governs their use. The convoluted logic of the court below appears to be that if an agency has discretion to deny a permit, applicants such as 383 have no constitutional interest in the outcome of those procedures. (3a-4a). More specifically, the City's short-circuited reasoning, which the court below adopted, is as follows: The special permit process places discretionary authority to grant or deny use of Terminal TDRs in the City Planning Commission. This grant of discretion negates 383's claim to a protected property interest and therefore insulates the permit-granting process from a constitutional substantive due process challenge. Moreover, because 383 cannot claim a property interest in the permit, it has no takings argument.

This argument conveniently ignores one essential fact —the permit process would never have been initiated without 383's *underlying property interest in Terminal TDRs*. Rather than looking to the existence of discretion, the court below ought to have considered whether the agency's discretion in *applying* permit conditions im-

permissibly burdened that underlying property interest. By sleight of hand, the City and the court below shifted the rights analysis so as to circumvent the true constitutional questions and conflict with this Court's assumptions in *Penn Central*. 438 U.S. 104.

This Court also needs to settle whether the ill-conceived substantive due process analysis underlying the denial of 383's constitutional claims should be sanctioned. This analysis was explicitly borrowed from the Second Circuit, which has institutionalized a focus on agency discretion as the touchstone for substantive due process claims in the land use context. *See RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 919 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989). Because permit processes are by their very nature imbued with discretion, however, this construct ensures that a special permit applicant cannot but lose on any constitutional claims. Several circuits have adopted this truncated approach to substantive due process. *See, infra*, at page 22. Others have focused, by contrast, on the nature of the process and whether the land-use decision failed to advance legitimate state interests. *See, infra*, at page 22. This split among the circuits, which affords some litigants the full protection of a due process analysis, while denying it to others, is a matter meriting resolution by this Court.

II. 383 MADISON HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN THE TERMINAL TDRS.

The cornerstone of 383 Madison's constitutional arguments is its property interest in approximately 1.5 million Terminal TDRs. The lower court steadfastly refused to acknowledge that property interest, assuming instead that the existence of discretion in the TDR permit-granting process somehow erased property rights. (3a-4a). But this is wholly inconsistent with this Court's analysis in *Penn Central*. 438 U.S. 104. For if Terminal TDRs are

not constitutionally protected, this Court would not have subjected the Terminal's landmark designation—which prevented the theretofore allowed use of those very development rights *over* the Terminal—to constitutional takings scrutiny in that case. Indeed, although the Court found, in *Penn Central*, that the Terminal's landmark designation did not effect a taking, it stressed that the TDRs constitute "valuable" "rights" that "undoubtedly mitigate whatever financial burdens the law has imposed on [the Terminal owners]." [6] *Id.* at 137.

This Court and other courts have repeatedly confirmed that development rights are property and that regulatory interference with those rights may raise constitutional concerns. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 715 (1987) (holding that each component of a fee interest—there, the right to bequeath—is a free-standing property interest, so that the abrogation of such a right, standing alone, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking); *Penn Central*, 438 U.S. at 143 n.5 (Rehnquist, J., dissenting) ("This Court has previously held that the 'air rights' over an area of land are 'property' for purposes of the Fifth Amendment) (citations omitted). In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), this Court recognized that restrictive conditions on development rights implicate constitutionally protected property interests—even when the use of those rights is subject to

[6] The Court held in *Penn Central* that the landmark designation did not effect a taking, because "[t]he restrictions imposed [by the Landmarks Preservation Law] are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper [through regulated use of the TDRs] but also other properties [through transfer or sale of the TDRs]." 438 U.S. at 138. Because *Penn Central* involved a facial attack on the Landmarks Preservation Law, the Court did not have occasion to address the constitutionality of the regulatory conditions as applied to the use of Terminal TDRs.

approval in a permit process. Thus, when presented with the California Coastal Commission's attempt to condition a building permit that would allow further development on plaintiffs' agreement to grant an easement across their property, this Court sustained a takings challenge to the Commission's actions. The New York courts have also recognized that development rights are entitled to constitutional protection. *See Seawall Assocs. v. New York*, 74 N.Y.2d 92, 109-11, *cert. denied*, 493 U.S. 976 (1989) ("development rights . . . are, standing alone, valuable components of the 'bundle of rights' making up fee interests") (citation omitted).

Ignoring these precedents, the Appellate Division relied on the reasoning in *Sudarsky v. City of New York*, 779 F. Supp. 287, 294-297 (S.D.N.Y. 1991), *aff'd mem.*, 969 F.2d 1041 (2d. Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1059 (1993), to dismiss 383's constitutional claims, "since plaintiff did not have a property right to the grant of a special permit . . ." (3a). The Appellate Division missed the point. It is because 383 Madison has a property right in the *TDRs* that the courts should subject the conditions imposed on their use to constitutional scrutiny. There is no doubt that *Sudarsky* efficiently resolves the problem of burgeoning federal caseloads in the land use and property development area by allowing constitutional arguments to be bypassed and dismissed, as they were by the court below. But, while efficiency is a beguiling goal, it should not be enlisted to deny the existence of property rights, here the TDRs.

Interestingly, the analytical framework set out in *Sudarsky* was not developed in either the takings or the substantive due process context, although, as exemplified in this case, it now enables the New York courts to eviscerate claims under either constitutional rubric. *Sudarsky* and the cases that spawned it evolved out of this Court's analysis of procedural due process claims in the at-will employment context. *See, e.g., Board of Regents v. Roth,*

408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). Those cases did not involve traditional property interests but centered on whether plaintiffs were entitled to particular procedures under the regulatory framework that created and governed the terms of their temporary employment positions. In *Roth*, for example, this Court found that the petitioner did not have a property interest in re-employment sufficient to require the University authorities to give him a hearing when his one-year employment contract was not renewed. 383 Madison also seeks constitutional scrutiny of certain regulatory conditions, but unlike in *Roth* and *Perry*, there is an underlying property right, the existence of which is beyond cavil.

The *Sudarsky* court's myopic focus on permit-granting discretion cannot negate the fact that 383's development rights are protectable property interests. Accordingly, this Court should examine the constitutionality of the regulatory scheme pursuant to which the City denied 383 Madison's proposal for use of its Terminal TDRs.

III. THE REGULATORY BURDEN IMPOSED BY THE SPECIAL PERMIT PROCESS FAILS TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE PURPOSE AND WORKS A TAKING OF VALUABLE PROPERTY.

This Court's recent cases hold that government regulation that significantly burdens a property interest will constitute a taking unless it "substantially advances" a legitimate state interest. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). *See also Nollan*, 483 U.S. at 834; *Seawall Assocs.*, 74 N.Y.2d at 107, 111. To meet this heightened constitutional scrutiny, a land use regulation must reflect an "essential nexus" between its means and its end. *Nollan*, 483 U.S. at 837. This is accomplished here only if the conditions imposed on the use of the Terminal TDRs serve the same end that the initial landmark designation and development prohibition served, *id.*; namely,

preservation of the Grand Central Station landmark in the context of orderly city planning without imposing undue hardship on the landmark or TDR owners. *See Penn Central*, 438 U.S. at 109, 110, 113-114 (Landmarks Preservation Law designed to foster civic pride, protect landmarks, ensure owners of landmarked properties a "reasonable return" and provide opportunities to transfer development rights to other parcels). But the application of the permit conditions—the "adjacent lot" and "unduly increase" bulk requirements—which the court below upheld, fails to meet this test.

A. The "Adjacent Lot" Requirement.

The City's interpretation of the "adjacent lot" provision, which was upheld by the court below, fails to promote any conceivable, legitimate governmental purpose, much less one related to the original purpose of preserving and enhancing the landmark without unduly burdening its owners. ZR § 74-79 defines "adjacent lot" as a lot contiguous, opposite or cater-corner to *either* the landmark site *or*—as established in the 1969 Chain Amendment—to a "lot in a series of lots held in the same ownership as the landmark site." As this Court noted in *Penn Central*, "the law governing the conditions under which transfers from landmark parcels could occur was liberalized" in 1969, "apparently to ensure that the Landmarks Law would not unduly restrict the development options of the owners of Grand Central Terminal." 438 U.S. at 114. But the interpretation of "adjacent lot" adopted here is inconsistent with this Court's recognition that the principal aim of the 1969 Chain Amendment was to provide economic relief to TDR holders. *See also* 1969 Amendments to the Zoning Resolution, City Planning Commission, November 5, 1969/Cal. No. 32, CP-20938 ("[t]he amendments will provide economic relief to the owner of a landmark building . . .") (57a). The City's interpretation would require that the receiving site for TDRs be linked to the Terminal by a chain of com-

mon lot ownership measured not as of 1969 but at the time of the proposed TDR transfer and use. Not only is this interpretation improper as a matter of regulatory construction, but it also fails to establish any constitutionally valid nexus.

The City's gloss—which requires that an "adjacent lot" be in a chain of lots under the "same ownership" *at the time of the TDR transfer*—would have enhanced the utility of the Terminal TDRs in 1969, but not in 1978, when *Penn Central* was decided, not in 1983 when 383 purchased the TDRs, and not now. In 1969 Penn Central was the common owner of a significant number of lots in the vicinity of the Terminal. However, bankruptcy proceedings in the early to mid-1970s forced Penn Central to sell off its surface ownership in the surrounding properties. Consequently, the interpretation of "same ownership" that the court below adopted stripped the Chain Amendment of all value. There are no properties that meet the miserly interpretation of "same ownership" endorsed here. Given that the City passed the Chain Amendment to enhance the opportunities for transfer of Terminal TDRs, the current interpretation of the "same ownership" requirement is in no way consonant with—much less does it substantially advance—its supposed compensatory purpose. *Cf. Nollan* 483 U.S. at 834. To the contrary, the City has successfully flouted its promise to increase TDR use and transferability.

To the extent that the Chain Amendment was intended to promote planning goals, the interpretation of "same ownership" adopted below thwarts that aim as well. Just as the City could not have foreseen, in 1969, that Penn Central would be forced to sell off most of its real estate holdings, the City could not have assessed with certainty the pattern of real estate ownership at any point in time, save one—the time of the passage of the Chain Amendment. For that reason, the identification of "adjacent lots" based on "same ownership" should be measured as

of that moment. Only at that one moment did the City know the potential receiving lots for the Terminal TDRs; from that point forward chains of common ownership could be constructed in myriad directions extending one block or ten, depending on the fortuity of real estate investment.

In fact, the City's 1989 report proposing regulations to create a new Special Sub-District in the Grand Central Terminal Area admits that the "same ownership" requirement (as interpreted by the City and adopted below) serves no planning purpose. The proposal states: "[c]urrent zoning regulations permit [transferable] development rights to be distributed over an area defined primarily by the terminal's complicated ownership patterns rather than by a plan based upon appropriate planning concerns." (New York Department of City Planning, November 1989 NYC DCP #89-45) (63a). Thus, *by the City's own admission*, the required constitutional nexus to orderly city planning and preservation concerns is lacking if "same ownership" is measured at the time of TDR transfer rather than at the time of enactment of the Chain Amendment.

B. The "Unduly Increase" Bulk Requirement.

The "unduly increase" bulk requirement stands on even weaker constitutional footing and contravenes the City's own regulation, ZR § 81-211. The City has tried to make a talisman of floor area ratio (hereafter "FAR"),[7] as evidenced by the New York State Supreme Court's nod to the City's contention that 383's proposed building "is

[7] Floor Area Ratio is a number computed by dividing the total floor area of a building by the total surface area of the zoning lot. The larger the lot, the smaller the FAR increase corresponding to a fixed amount of additional floor space. Thus, the addition (as 383 proposed) of 800,000 square feet of floor space at a site could produce a FAR of 33 or 20, depending on the size of the lot supporting the structure. FAR is thus a somewhat artificial measure of bulk.

at 33.15 FAR more than twice the as of right bulk in this extremely congested area . . . ." (19a). The City's Zoning Resolutions and policy declarations, however, highlight the fact that this FAR consideration, the sole predicate for the Appellate Division's determination that 383 Madison's proposal would "unduly increase" bulk (2a-3a), serves no legitimate government purpose.

The "unduly increase" bulk condition, contained in ZR § 74-792 passed in 1969, is applicable to "all districts" except for a few not relevant here. (49a, 50a). It provides a rule of general applicability, authorizing the City to make bulk impact determinations for TDR use but proffering no guidance as to how such determinations are to be made. In 1982, however, the City passed ZR § 81-211 containing a detailed matrix specifying the FAR allowable in each district. (53a-55a). While both the City and the court below have treated FAR as an appropriate proxy for bulk, they have categorically refused to apply ZR § 81-211 as the appropriate indicator of what constitutes "undue" bulk in a given district. In choosing to ignore ZR § 81-211, the City and the court below have both contravened the governing regulatory scheme and failed to interpret the "unduly increase" bulk requirement in a way that substantially advances a legitimate governmental purpose. See also ZR § 74-792(5)(a) (recognizing that advantages of landmark preservation will necessarily be counterbalanced by increased development of surrounding area through TDR use). (51a).

The matrix in ZR § 81-211 could not be more resolute: The entry corresponding to transfers of TDRs from landmarks to adjacent lots in the C5-3 district (the district encompassing the Terminal and 383 Madison Avenue) indicates that there is "No limit" on the "Maximum amount of transferable development rights (FAR) from a landmark zoning lot that may be utilized on an 'adjacent' receiving lot." (55a). As if that pronouncement were insufficiently clear, ZR § 81-212 explicitly provides

that any conflict between the "No limit" provision of ZR § 81-211 and any provision of ZR § 74-79 (including § 74-792(5)(a)) must be resolved in favor of § 81-211.[8] (56a). There is thus no doubt that § 81-211 was meant to be read in conjunction with § 74-792 and that the "No limit" policy controls and supersedes the City's general authority under § 74-792 to determine whether a development proposal will "unduly increase" bulk. The City may not conduct its review of the "undue" bulk requirement as if ZR §§ 81-211 and 81-212 did not exist. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("an order may not stand if the agency misconceived the law").[9] Even if the Zoning Resolution had failed to provide such a well-blazed interpretive trail, under accepted principles of statutory construction, a specific reference within a later statute prevails over the general, earlier statute to the extent of any inconsistency. *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974).

While the Appellate Division acknowledged the existence of ZR § 81-211, it then dismissed it out of hand:

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[8] ZR § 81-211 provides: "Wherever there is an inconsistency between any provision in Section 74-79 and the table in Section 81-211, the table in Section 81-211 [stating "No Limit"] shall apply."

[9] New York courts, in common with those elsewhere, have uniformly held that each agency is encouraged and, at times, *obliged* to issue regulations establishing reasonable limits on the agency's discretion. *Robert Lee Realty v. Village of Spring Valley*, 61 N.Y.2d 892, 893-94 (1984) ("standards for issuance of such a permit may not . . . be so general or imprecise as to leave issuance of a permit to the unchecked discretion of the issuing authority"). Section 81-211 clearly establishes such limits. Having duly issued a regulation that clearly limits the City's discretion to restrict the use of TDRs on a single site, the City may not now conduct its "undue bulk" review as if that regulation did not exist. *See Chinese Staff & Workers Ass'n v. New York*, 68 N.Y.2d 359, 361-68 (1986) (rejecting agency decision where State Environmental Quality Review Act review failed to follow own regulations); *WEOK Broadcasting Corp. v. Planning Bd. of Lloyd*, 79 N.Y.2d 373, 383 (1992) (where agency determination "is affected by an error of law . . . the agency's determination may be annulled").

"Even if plaintiff's property were adjacent to the Terminal, we would have rejected its reading of Section 81-211 to the extent such would deprive the City of regulatory authority over the concentration of transferable development rights on a single site." [10] (2a). By declaring, in effect, that § 81-211 may be deprived of all natural meaning in order to preserve the City's unbounded discretion to "evaluate development at any site in terms of standard zoning criteria," (2a), the court below contravenes both fundamental principles of statutory construction, *see Exxon Corp. v. Board of Standards & Appeals,* 128 A.D.2d 289, 295 (1987), *appeal denied,* 70 N.Y.2d 614 (1988) ("effect and meaning must, if possible, be given to the entire statute and every part and word thereof") (citations omitted), and the clearly expressed governmental goal of balancing preservation interests with the need to allow TDR use. *See Penn Central,* 438 U.S. at 110, 113-14.

In any event, even prior to the promulgation of ZR § 81-211, the City had convinced this Court of its willingness to approve "in highly commercialized areas like midtown Manhattan, the transfer of all unused development rights to a single parcel." *Penn Central,* 438 U.S. at 114. The City repeated this "No limit" view in its report proposing regulations to create a new Special Midtown District: "In the highest density commercial Midtown districts, an eligible receiving lot can, regardless of the existing scale of development, accept transfer of any amount of additional density from a landmark. . . . These provisions are all carried forward [from Section 74-792] into the proposed special Midtown District regulations

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[10] The Appellate Division's assertion is also substantively misguided. Since a single "adjacent" lot can receive no more TDRs than a single granting lot is eligible to supply, ZR § 81-211 ensures that over-development (greater than as of right) on the receiving site is equal to and counterbalanced by the "underdevelopment" on the (landmark) sending site.

without change." (City Planning Commission, March 16, 1982 Cal. No. 1, N 820253 ZRM, at 26) (60a).

By upholding the rejection of 383's permit application based on an arbitrary FAR limitation that conflicts with the City's public declarations and a clear regulatory mandate, the court below not only failed to promote legitimate state interests, it violated those interests. *Cf. Nollan*, 483 U.S. at 837 ("constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition"). As with the "adjacent lot" requirement, the City failed to apply the "unduly increase" bulk requirement so as to achieve the overall goals of balancing underdevelopment on the landmark site with additional development elsewhere. Thus, the means-end relationship required under *Nollan* is conspicuously lacking.

Ultimately, the court below dismissed 383's takings arguments by conflating the substantive due process analysis of *Sudarsky* with takings analysis. But the permit-granting agency's discretionary authority is in no way dispositive of 383's *takings* claims. Significantly, the *Sudarsky* court itself applied the full takings clause scrutiny mandated by *Nollan* in analyzing the burdens imposed by the permit process there. The Appellate Division's cursory dismissal of 383's constitutional arguments, by contrast, suggests that the court failed even to consider an appropriate takings analysis. Had it done so, the Appellate Division would have determined that the challenged conditions of "adjacent lot" and "undue bulk," as applied, were neither effective to substantially advance legitimate state interests, *see Nollan*, 483 U.S. at 834, nor reasonably necessary to effectuate a substantial government purpose. *Penn Central*, 438 U.S. at 127.

IV. THE PERMIT PROCEDURE DEPRIVED 383 MADISON OF SUBSTANTIVE DUE PROCESS.

The New York Court of Appeals has held that "[a] zoning ordinance is unreasonable, under traditional police power and due process analysis, if it encroaches on the exercise of private property rights without substantial relation to a legitimate governmental purpose." *Fred F. French Investing Co. v. New York*, 39 N.Y.2d 587, 596, *cert. denied, and appeal dismissed*, 429 U.S. 990 (1976). The appropriate constitutional scrutiny would thus have inquired whether the City's application of the "adjacent lot" and "unduly increase" bulk requirements encroached on 383's property rights in its TDRs but maintained the required relation to a legitimate government purpose. Nonetheless, the court below treated 383's substantive due process argument as dismissively as its takings claim, commenting, not on whether the permit conditions, as applied, furthered a legitimate government purpose, but on the irrelevant fact that "plaintiff did not have a property right to the grant of a special permit . . ." (3a).

As explored above, the Appellate Division borrowed this permit entitlement analysis from the Second Circuit. Even the Second Circuit, however, has questioned the very reasoning and relevance of this analysis in the land-use context. In *RRI Realty*, 870 F.2d 911, the court noted that "[a]fter 1972, some courts considering constitutional challenges to land regulation began their inquiry by citing *Roth* and asking whether the plaintiff had a 'clear entitlement' to the approval he was seeking from the land use regulating body." *Id.* at 915 (citations omitted). But the court allowed that its adherence to this approach might be misguided:

> It is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exists in what has been applied for—whether a zoning variance, a business license, or a building permit—instead of simply recognizing the owner's indisputable property interest in the land he

> owns and asking whether local government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the application arbitrarily and capriciously.

Id. at 917. While acknowledging that the entitlement test engendered a focus on the wrong property interest, the *RRI* court, nevertheless, declined to break with precedent. No matter how questionable, "*Yale Auto Parts* [*Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985),] and its progeny have committed this Circuit to the 'entitlement' inquiry in land use regulation cases." *Id.* at 918.

Several other circuits have imported this ill-suited entitlements analysis to address substantive due process concerns in land use cases, looking, as the Second Circuit does, to the discretion conferred on the permit-granting agency to determine the presence of a protectable property interest. *See Biser v. Town of Bel Air*, 991 F.2d 100, 103-04 (4th Cir.), *cert. denied*, —— U.S. ——, 114 S. Ct. 182 (1993); *Silver v. Franklin Tp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992); *Carolan v. City of Kansas City, Mo.*, 813 F.2d 178 (8th Cir. 1987). Others have assessed the rationality of the regulation as applied to the interest at stake. *See Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1119 (10th Cir. 1991); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir.), *reh'g denied, en banc*, 893 F.2d 346 (1989); *Bello v. Walker*, 840 F.2d 1124, 1128-1130 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988), and *cert. denied*, 488 U.S. 868 (1988); *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir.), *cert. denied*, 477 U.S. 905 (1986), and *cert. denied*, 479 U.S. 822 (1986). The disharmony among the circuits on this issue has been attributed in at least one case to the lack of guidance from this Court. *See New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1480 n.5 (7th Cir. 1990) ("It must be acknowledged frankly that the Supreme Court has yet to set the contours of any substantive due process right with respect to property interests.").

Added to the confusion among the circuit courts is the fact that the New York state courts, contrary to prior holdings, have now seen fit to apply entitlements analysis not only to due process claims but also, implicitly, to takings claims such as 383's as well. The bounds of substantive due process and the contours of the relevant constitutional analysis in the land-use context are ripe for resolution by this Court. As discussed above, the circular reasoning of *Sudarsky*, as adopted by the Appellate Division, eliminates *any* evaluation of constitutional claims and forestalls any consideration of the claimed arbitrary nature of the permit process. For had the Appellate Division undertaken the proper inquiry, it would have found no relationship—much less a rational one—between the restrictive "adjacent lot" and "unduly increase" bulk conditions applied here and the stated goals of the Landmarks Preservation Law and accompanying sections of the Zoning Resolution as understood by this Court in *Penn Central*. Unless checked by this Court, entitlements analysis as exemplified in *Sudarsky* threatens to eliminate review of valid constitutional claims in the land use context.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.
Counsel of Record
DEBRA A. VALENTINE
HILARY R. HEGENER
O'MELVENY & MYERS
555 13th Street, N.W.
Suite 500 West
Washington, D.C. 20004
(202) 383-5325
Attorneys for Petitioner

February 11, 1994

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APPENDIX A

NEW YORK SUPREME COURT
APPELLATE DIVISION
FIRST DEPARTMENT

49063

383 MADISON ASSOCIATES,
Plaintiff-Appellant,

-against-

CITY OF NEW YORK, *et al.*,
Defendants-Respondents.

Rosenberger, J.P., Kupferman, Asch, Rubin, JJ.

Order and judgment (one paper), Supreme Court, New York County (Eugene Nardelli, J.), entered November 1, 1991, which, *inter alia,* declared the denial of plaintiff's application for a special permit was not improper as a matter of administrative or constitutional law, unanimously modified, on the law, to the extent of declaring that there is no rational basis for defendants' determinations that the disadvantages covered by reduced light and air would not be offset by the advantages of the preservation of Grand Central Terminal as a landmark, that plaintiff's proposal for the continuing maintenance of the Terminal would not result in its preservation, and that the proposed transfer of transferable development rights would unduly increase population density, and otherwise affirmed, without costs.

Plaintiff owns a building site in the vicinity of Grand Central Terminal, a designated landmark, and together with successors in interest of the Penn Central Corporation, applied to the City Planning Commission for a

special permit allowing for the transfer of transferable development rights to be used to develop a 74-story building on plaintiff's site.

The application was rejected after a protracted process marked by numerous unjustified delays in violation of 6 NYCRR 617.8 requiring co-lead agencies to take appropriate action within 30 days, and that occasioned at least two proceedings by plaintiff to compel municipal agencies to act. In one such proceeding following a three-year delay, Supreme Court ordered the relevant city agencies to certify that plaintiff's draft environmental impact statement was complete. The application was finally rejected on various statutory and regulatory grounds, only some of which were valid. We modify the judgment to delete those paragraphs confirming determinations that have no rational basis in the record.

Because a pattern of common ownership that once joined this property and those intervening with the Terminal has been disrupted by sales of the parcel as well as the intervening lots by Penn Central and its successors in interest, the property is not a site "adjacent" to the landmarked Terminal within the meaning of Part 74 of the New York City Zoning Resolution. Therefore, it is not includable within the class of properties eligible to receive transferable development rights, and plaintiff may not avail itself of the provisions of the "chain amendment" set forth in section 74-79 of the Zoning Resolution.

Even if plaintiff's property were adjacent to the Terminal, we would have rejected its reading of section 81-211 to the extent such would deprive the City of regulatory authority over the concentration of transferable development rights on a single site. This section is not inconsistent with the authority of the City's zoning agencies to evaluate development at any site in terms of standard zoning criteria (*see, Matter of Cicenia v Zoning Board of Appeals*, 157 AD2d 722, 725). Since the site is zoned for a floor area ration of 15, but the proposed develop-

ment would have required a floor area ratio in excess of 33, a rational basis exists for the determination that the concentration of these transferable development rights at this site would increase the bulk of the site out of proportion to the surrounding neighborhood.

However, we reject the City's contention that the proposed development would disproportionately impact on the access of surrounding sites to air and light. Comments by the City Planning Commission itself made in the late 1960's when the concept of the transferable development rights was being debated, which emphasized that the landmarked area would create a "saucer of light" that likely would offset a loss of light if the development rights were to be transferred, undermines the very findings presently made by that agency. Since transferable development rights originally were envisioned as a trade-off, shifting as-of-right development to adjacent sites, we find no basis to conclude that the facts of this case would have created a burden greater than that originally contemplated. We also reject the administrative determination that the increase of approximately 4900 pedestrians, in a vicinity populated daily by some 700,000 workers, posed the threat of a disproportionate impact. Finally, the report of the Landmarks Preservation Commission failed to identify in concrete terms what additional reasonable steps would have been required for plaintiff, who is not a lessee of the Terminal and is not presently charged with a duty of maintenance, to ensure maintenance of this landmark. While the City may require applicants to assume maintenance responsibilities of landmarks as a condition of a special permit, it is not clear why the Landmarks Preservation Commission seemed determined to relieve the Metropolitan Transit Authority, an independent third party, of its obligation as lessee of the Terminal to maintain the Terminal by reposing direct responsibility for such with plaintiff.

Finally, since plaintiff did not have a property right to the grant of a special permit, their constitutional claims

must be rejected (*see, Sudarski v City of New York*, 779 F Supp 287, 297, *affd*, 969 F2d 1041, *cert denied*, 113 S Ct 1059).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: May 20, 1993

_____

Clerk.

APPENDIX B

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

At IAS Part 2 of the Supreme Court of the State of New York held in and for the County of New York, this 7th day of October, 1991

PRESENT: HON. EUGENE L. NARDELLI, J.S.C.

Index No. 23621/89

383 MADISON ASSOCIATES,

Plaintiff,

vs.

CITY OF NEW YORK, NEW YORK CITY PLANNING COMMISSION, NEW YORK LANDMARKS PRESERVATION COMMISSION, SYLVIA DEUTSCH, individually and as Chairperson of New York City Planning Commission and Director of Department of City Planning, DENISE M. SCHEINBERG, individually and as Vice-Chairperson of New York City Planning Commission, SALVATORE C. GAGLIARDO, MARILYN MAMMANO, WILLIAM GARRISON MCNEIL, AND DANIEL T. SCANNELL, individually and as Commissioners of New York City Planning Commission,

Defendants.

ORDER & JUDGMENT

Plaintiff 383 MADISON ASSOCIATES having commenced an action seeking a declaratory judgment that 383 Madison Avenue is eligible to receive transferable development rights "TDR's" from Grand Central Station and that defendants' refusal to allow such a transfer is a viola-

tion of plaintiff's due process and equal protection rights as well as an unconstitutional taking of property and seeking 480 million dollars in damages and defendants having answered and moved for summary judgment dismissing the complaint and plaintiff having cross moved for a continuance to permit disclosure, and the matter having regularly come on before the Honorable Eugene L. Nardelli, IAS Part 2 of the Court held at the Courthouse thereof, located at 60 Centre Street, New York, New York on October 31, 1990 and

Now upon reading and filing the Summons dated October 30, 1989; the Complaint verified on October 27, 1989, and Exhibits thereto; the Answer verified on February 20, 1990; Defendants Notice of Motion for Summary Judgment dated February 20, 1990; the Affidavit of Con Howe sworn to on February 20, 1990, and Exhibits thereto; the Affidavit of David Todd sworn to on February 15, 1990, and Exhibits thereto; the Affirmation of Virginia Waters dated February 16, 1990, and Exhibits thereto; all in support of the motion for summary judgment; Plaintiff's Notice of Cross Motion for a Continuance to Permit Disclosure dated July 26, 1990; the Affidavit of J. Michael Harty sworn to on July 25, 1990, and Exhibits thereto; the Affidavit of Frederick W. Rovet sworn to on July 25, 1990, and Exhibits thereto; the Affidavit of Vern J. Bergelin sworn to on July 25, 1990, and Exhibits thereto; all in opposition to the motion for summary judgment and in support of the motion for a continuance; the Reply Affirmation of Virginia Waters dated October 17, 1990, and Exhibits thereto; the Affidavit of Gail Benjamin sworn to on October 17, 1990, and Exhibits thereto; the Affidavit of Mark London sworn to on October 17, 1990, and Exhibits thereto; the Affidavit of Michael S. Graham sworn to on October 5, 1990, and Exhibits thereto; all in support of the motion for summary judgment; the Reply Affidavit of Robert F. Kramer sworn to on October 30, 1990, and Exhibits thereto, in opposition

to the motion for summary judgment and in support of the motion for a continuance; the Reply Affirmation of Virginia Waters dated November 2, 1990, in support of the motion for summary judgment; the Notice of Motion of the Municipal Art Society of New York ("MAS") to Intervene and of MAS, the National Center for Preservation Law, the National Trust for Historic Preservation in the United States and the New York Landmarks Conservancy, Inc., to Participate as *Amici Curiae*, dated June 15, 1990; the Affidavit of Howard G. Sloane sworn to on June 15, 1990; the Affidavit of Kent L. Barwick sworn to on May 23, 1990; the Proposed Answer of MAS verified on May 23, 1991; all in support of this motion; and the Affidavit of Vern J. Bergelin sworn to on October 17, 1990, in opposition to the motion to intervene;

And plaintiff having appeared by William T. Coleman, Jr., of O'MELVENY & MYERS, its attorneys; and defendants having appeared by VICTOR A. KOVNER Corporation Counsel of the City of New York (Virginia Waters, of Counsel) and *amici curiae* having appeared by William E. Hegarty, counsel for MAS, all on October 31, 1990, and this Court after due deliberation having filed its memorandum decision dated August 6, 1991, it is

ORDERED, that the motion of the Municipal Art Society of New York, Inc., to intervene as a defendant in this action is denied, and it is further

ORDERED, that the Municipal Art Society of New York, Inc., the National Center for Preservation Law, the National Trust for Historic Preservation, and the New York Landmarks Conservancy, Inc., are granted leave to participate in this action as *amici curiae*, and it is further

ORDERED, that plaintiff's cross-motion for a continuance to permit disclosure is denied, and it is further

ORDERED, ADJUDGED and DECLARED that the parcel of land located at 383-385 Madison Avenue in the Borough of Manhattan in the City of New York and oc-

cupying the entire city block bounded by Madison Avenue, 47th Street, Vanderbilt Avenue and 46th Street is not "adjacent" to Grand Central Terminal or to the lot on which the Terminal stands within the meaning of section 74-79 of the Zoning Resolution of the City of New York ("ZRCNY § 74-79"), and it is further

ORDERED, ADJUDGED and DECLARED that defendants' denial of plaintiff's application for a Special Permit to transfer approximately 787,000 square feet of development rights from the Grand Central Terminal to the 383-385 Madison Avenue site was neither irrational, nor arbitrary, nor capricious, nor affected by any error of law, and it is further

ORDERED, ADJUDGED and DECLARED that there is a rational basis in the record for defendants' determination that the proposed transfer of development rights would unduly increase the bulk of the new development, the density of population and the intensity of use to the detriment of the occupants of buildings on nearby blocks, and it is further

ORDERED, ADJUDGED and DECLARED that there is a rational basis in the record for defendants' determination that the disadvantages to the surrounding area caused by reduced access of light and air would not be more than offset by the advantages of the Terminal's preservation as a landmark, and it is further

ORDERED, ADJUDGED and DECLARED that there is a rational basis in the record for defendants' determination that plaintiff's proposed program for the continuing maintenance of the landmark Terminal would not result in preservation of the Terminal, and it is further

ORDERED, ADJUDGED and DECLARED that summary judgment is granted to defendants on plaintiff's claim that defendants' denial of plaintiff's application deprived plaintiff of its property without substantive due process of law, and it is further

ORDERED, ADJUDGED and DECLARED that summary judgment is granted to defendants on plaintiff's claim that defendants' denial of plaintiff's application deprived plaintiff of its property without procedural due process of law, and it is further

ORDERED, ADJUDGED and DECLARED that summary judgment is granted to defendants on plaintiff's claim that defendants' denial of plaintiff's application effected an unconstitutional taking of private property for public use without just compensation, and it is further

ORDERED, ADJUDGED and DECLARED that summary judgment is granted to defendants on plaintiff's claim that defendants' denial of plaintiff's application denied plaintiff equal protection of the law, and it is further

ORDERED, ADJUDGED and DECLARED that in all other respects plaintiff's complaint is dismissed.

ENTERED

/s/ E.T.N.
J.S.C.

/s/ Norman Goodman
Clerk

[Filed Nov. 1, 1991]

APPENDIX C

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
IAS PART 2

Index #23621/89

383 MADISON ASSOCIATES,
Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY PLANNING COMMISSION, NEW YORK LANDMARKS PRESERVATION COMMISSION, SYLVIA DEUTSCH, individually and as Chairperson of New York City Planning Commission and Director of Department of City Planning, DENISE M. SCHEINBERG, individually and as Vice-Chairperson of New York City Planning Commission, SALVATORE C. GAGLIARDO, MARILYN MAMMANO, WILLIAM GARRISON MCNEIL, and DANIEL T. SCANNELL, individually and as Commissioners of New York City Planning Commission,
Defendants.

Eugene L. Nardelli, J.:

Defendants in this declaratory judgment action arising, in essence, out of the Landmark status of Grand Central Terminal (the "Terminal"), move for summary judgment dismissing the complaint on the grounds that there are no genuine material issues of fact and they are entitled to judgment in their favor as a matter of law (motion sequence no. 001). Plaintiff cross-moves for a continuance pursuant to CPLR § 3212(f) to permit disclosure. In a

companion motion (motion sequence no. 002) the Municipal Arts Society of New York, Inc. ("MAS") moves pursuant to CPLR §§ 1012 and 1013 to intervene and the National Center for Preservation Law, the National Trust for Historic Preservation in the United States and the New York Landmarks Conservancy, Inc. join in the motion of MAS and seek to join in MAS's Memorandum of Law as *amici curiae*. Defendants' motion is granted and plaintiff's cross-motion is denied. The motion of MAS and the other entities seeking, respectively, to intervene and *amici curiae* status is denied as to intervenor status and granted as to *amicus* status for MAS and for the above named entities to join as *amici curiae*.

The Terminal was designated a landmark and the city block it occupies a landmark site under the New York City Landmark Preservation Law ("Landmark Law") on September 21, 1967. Plaintiff, 383 Madison Avenue Associates ("383"), brought this action against the City of New York (the "City"), the New York City Planning Commission ("CPC"), New York Landmarks Preservation Commission, Sylvia Deutsch, individually and as chairperson of CPC and Director of the Department of City Planning ("DCP"), Denise M. Scheinberg, individually and as Vice-Chairperson of CPC, and Salvatore C. Gagliardo, Marilyn Mammano, William Garrison McNeil, and David T. Scannell, individually and as Commissioners of CPC, seeking judgment declaring 383's property at 383 Madison Avenue, occupying an entire city block bounded by Madison Avenue, 47th Street, Vanderbilt Avenue and 46th Street (the "383 Property"), to be eligible to receive the transferable development rights ("TDRs") from the Terminal to enable 383 to build a 74 story office tower that would be the fourth highest building in New York City, declaring certain of the several grounds for defendants' disapproval of the application filed for the special permit to transfer the TDRs to 383 to be illegal and unconstitutional, enjoining CPC to issue a special permit for

the transfer of the TDRs to 383 for use in its proposed development and from taking certain possible future actions, and awarding damages for defendants' arbitrary and capricious frustration and obstruction of the development of the 383 Property since its inception. In its five causes of action plaintiff alleged, in substance, that: (1) disapproval of 383's application for the TDRs was based on an interpretation of Zoning Resolution 74-79 ("ZR74-79") that is erroneous on several grounds as are CPC's alternative grounds as to the bulk of the proposed building, population density and use intensity, light and air effects and continuing Terminal maintenance plans, that these determinations were irrational, arbitrary and capricious and 383 has been denied procedural due process thereby; (2) 383 has been denied substantive due process in what is essentially alleged to be a consistent pattern of arbitrary and capricious refusal by CPC to permit any TDRs to be transferred for construction of any building that would use a significant number of the 1,700,000 available Terminal TDRs on either the 383 Property, the Terminal itself or, for example, the Post Office Property owned by the United States Postal Service and leased to Sterling Equities, not a party to this action, thus depriving 383 of a substantial property interest without due process of law in a pattern that will continue unless defendants' actions are restrained and set aside; (3) the actions of defendants, by going beyond the scope of permissible regulation, have made the designation of Terminal and its lot a taking of property for public use without due process of law and just compensation as to Terminal's owner, New York and Harlem Railroad Company ("NYHRR"), a subsidiary of Penn Central Corp. ("Penn Central"), and 383 as, respectively, contract vendor and vendee; (4) that 383 was denied equal protection of the law in that the program it submitted for maintaining the landmark, which was identical to one accepted where Terminal TDRs were transferred to another site, was found inadequate by defendants; and (5) defendants' actions violated

42 USC §§ 1981 and 1983. Defendants' answer denied the material allegations of the complaint and interposed ten affirmative defenses which include the grounds on which their motion for summary judgment relies.

Defendants and the amici curiae have submitted memoranda of law as well as copies of documents, records and other material which in exhaustive and meticulous detail show that as to the first cause of action, CPC had valid reasons for not issuing the special permit to 383. Its determination was rational on four separate grounds each of which would have been sufficient reason in itself for denying the permit. The second through fifth causes of action are also shown to be without merit.

The four grounds cited and then summarized as findings in the CPC Resolution disapproving the grant of the special permit to 383 are that: (1) 383 is not an adjacent lot and that the application is not legally eligible for not meeting the requisite ownership requirements; (2) transfer of the TDRs as planned will unduly increase the bulk, density of population and intensity of use to the detriment of occupants of buildings on nearby blocks; (3) unmitgable adverse environmental impacts; (4) the proposed program for continuing maintenance of the landmark is insufficient.

There is no question but that pursuant to ZR74-79 as amended in 1969 (the "Chain Amendment") to, inter alia, extend transferability of TDRs from the Terminal, 383 is not an adjacent lot. ZR74-79 provides in pertinent part:

> For the purposes of this Section, the term "adjacent lot" shall mean a lot which is contiguous to the lot occupied by the landmark building or other structure or one which is across a street and opposite to the lot occupied by the landmark building or other structure or, in the case of a corner lot, one which fronts on the same street intersection as the lot occupied by

> the landmark building or other structure. It shall also mean in the case of lots located in C5-3, C5-5, C6-6, C6-7 or C6-9 Districts a lot contiguous or one which is across a street and opposite to another lot or lots which except for the intervention of streets or street intersections form a series extending to the lot occupied by the landmark building or other structure. All such lots shall be in the same ownership (fee ownership or ownership as defined under zoning lot in Section 12-10 (DEFINITIONS).

It is undisputed that the 383 Property is not contiguous to, across the street and opposite to, or cater-corner to the Terminal lot, nor were the owners of the intervening zoning lots joined in the application as parties in interest pursuant to Zoning Resolution 12-10 ("ZR12-10") to satisfy the statutory definition of "adjacent" with respect to the intervening lots. Moreover, 383 contends—and defendants concede—that when the Chain Amendment became effective in 1969, the 383 Property was an adjacent lot by virtue of a chain of common ownership; in 1969 Penn Central owned 22 other properties near the Terminal, including 383 Madison Avenue. During the 1970's, as part of bankruptcy proceedings, Penn Central sold a number of these properties, including 383 Madison Avenue. However, 383 contends that pursuant to ZR74-79 adjacency was permanently fixed at the time the Chain Amendment was adopted, cannot change with changes in ownership, and is not to be determined as of the time of transfer of TDRs; that NYHRR owns a continuous fee chain of subsurface tax lots reaching from the Terminal lot to the 383 lot, and ZR74-79 does not require common ownership of a surface—rather than a subsurface—interest in such lots; that CPC's determination of non-adjacency of the 383 Property and its non-eligibility to receive Terminal TDRs deprives 383 of property without substantive due process; and, finally, 383 urges that even if defendants' interpretation of ZR74-79 is not an uncon-

stitutional taking and is otherwise correct, they are estopped from applying their interpretation.

Each of 383's contentions as to "adjacent" status is without merit. There is no evidence in the language of ZR74-79 or its legislative history that "adjacent" status was frozen as of the effective date of the Chain Amendment so that a site eligible to receive TDRs in 1969 has a vested right thereto regardless of changes in ownership of intervening lots. The pertinent language of ZR74-79, if read as in normal usage, indicates that "the same ownership" refers to conditions at the time of application for the requisite special permit. Moreover, in specific instances where a zoning resolution is intended to provide for specific rights to be determined and frozen as of its effective date or other specific date, the language is explicit to that effect (see, e.g. ZR12-10 Zoning Lot [a], [b]; ZR12-10 Railroad or transit air space; ZR25-32; ZR77-03); thus it is reasonable to conclude that the absence of a reference to such date in ZR74-79 is intentional. The chain of "the same ownership" at the time of application for a special permit for transfer of TDRs also ensures that where ZR74-792(3)(c) is applicable its conditions may be met. CPC's reading of ZR74-79 also conforms to its construction by the New York State Court of Appeals in the "Landmark Litigation" commenced in 1969 by Penn Central against the City of New York challenging the constitutionality of the New York City Landmarks and Preservation Law as applied to it, and concluded in 1978 when the United States Supreme Court held the landmark designation of the Terminal constitutional (*Penn Central Transportation Co.* v. *City of New York*, 50 AD2d 265, aff'd. 42 NY2d 324, aff'd. 438 US 104). In the Landmark Litigation the Court of Appeals refers to the 8 parcels owned by Penn Central after the sale of certain properties in the course of the bankruptcy proceeding rather than to all those owned in 1969 at the time the Chain Amendment was added to

ZR74-79, as possible receiving sites for Terminal TDRs (42 NY2d at 334).

Nor can 383's contentions as to subsurface tax lots confer adjacent status upon the 383 Property. Development rights are an inherent attribute attribute of ownership of the surface of property (*Macmillan, Inc.* v. *CF Lex. Associates,* 56 NY2d 386). This concept is reflected throughout the language and plain meaning of various sections of the New York Zoning Resolution. Zoning lots are the regulatory units used throughout the New York City Zoning Resolution and are the basic measure for calculating compliance; for example, bulk calculations, based on Floor Area Ratios ("FARs") are determined by the surface area of the zoning lot (ZR12-10 Floor area ratio; *Newport Associates* v. *Solow,* 30 NY2d 263, 265, cert. denied 410 US 931). Moreover, the very concept of TDRs relates to *surface* rights as to a zoning lot, and their availability and precise quantity is calculated on the basis of the dimensions of a zoning lot and other zoning factors totally unrelated to tax lots. Thus the underground tax lots are irrelevant to the matter of adjacency as defined in ZR74-79.

Plaintiff's arguments that defendants are collaterally and equitably estopped from applying their interpretation of ZR74-79 is also unavailing to defeat the motion for summary judgment. As to collateral estoppel, 383 asserts that the bankruptcy court, by approving Penn Central's sales of certain adjacent properties, determined that the sales did not diminish the number of eligible receiving sites for TDRs since absent such determination, approval would have involved "reducing the value of—indeed making a nullity of—the TDRs." (Plaintiff's Memorandum of Law, July 26, 1990, pp. 52-53). This contention is presented in purely speculative and conclusory terms, with not even a hint of any evidentiary showing that this issue was litigated and decided in the bankruptcy proceeding. Nor is plaintiff's statement as to the reduction of the

value of the TDRs shown to be true. On these as on other issues, 383 has failed to lay bare its proof of evidentiary facts to show a bona fide issue requiring trial; defendants have made out a prima facie basis for a grant of summary judgment and conclusory allegations cannot defeat defendants' motion (*Zuckerman* v. *City of New York*, 49 NY2d 557, 562; *Albouyeh* v. *County of Suffolk*, 96 AD2d 543, 545, aff'd. 62 NY2d 681). As to equitable estoppel, the City of New York was merely a creditor in the bankruptcy proceeding and had neither a legal nor equitable duty to protect Penn Central's best interest, and it was in Penn Central's best interest at the time to sell. It was a business decision made by Penn Central with knowledge of what its effects would be. That it was a knowing decision is evident in testimony elicited, in the course of the Landmark Litigation, from Frederick W. Rovet ("Rovet"), then an officer of Penn Central and currently general counsel to plaintiff. In his testimony Rovet indicated that he was aware that the sale of intervening properties would break the chain of ownership and limit the number of adjacent lots. Similarly, Penn Central's post-trial proposed findings of fact and conclusions of law and its post-trial memorandum in that litigation named four adjacent sites that would still be eligible to receive TDRs upon approval by the Bankruptcy Court and completion of the then proposed sale of certain other properties. In 1983 Penn Central corresponded with DCP, querying as to whether certain lots, including the 383 Property lot, were adjacent properties, and was informed at that time that they were not. The contract between 383 and NYHRR provides that if during various stages of proceedings 383 Madison Avenue is determined not to be an adjacent zoning lot within ZR74-79, 383 has the right to terminate the contract. Thus, no basis for an equitable estoppel against the City has been established. More significantly, as a matter of law, the doctrine of equitable estoppel may not be invoked against the City:

> We have held many times that estoppel is not available against a governmental agency in the exercise of its governmental functions (*Matter of City of New York* v. *City Civ. Serv. Comm.*, 60 NY2d 436, 449; *Granada Bldgs.* v. *City of Kingston*, 58 NY2d 705, 708; *Public Improvements* v. *Board of Educ.*, 56 NY2d 850, 852; *Matter of Hamptons Hosp. & Med. Center* v. *Moore*, 52 NY2d 88, 93, *supra*; *Matter of Galanthay* v. *New York State Teachers' Retirement System*, 50 NY2d 984, 986; *Board of Supervisors* v. *Ellis*, 59 NY 620, 625). And, as was made clear in *Moore* (52 NY2d, at p 93, n 1), such exception as has been made to that rule is of "very limited application: and has been "addressed to an unusual factual situation." (*Mtr. of Daleview Nursing Home* v. *Axelrod*, 62 NY2d 30, 33).

The fact situations in the exceptional cases cited by 383 are inapposite here.

CPC's denial of the special permit sought by 383 was valid also on the basis of the failure of 383's proposal to meet the limiting criteria in ZR74-792 which are applicable on transfers of TDRs pursuant to ZR74-79 as amended in 1969. The amendment, inter alia, eliminated the 20% cap on the quantity of TDRs that could go to a receiving site to permit more bulk than allowable as of right in a zoning district. The allowable bulk, as expressed in FARs, is the maximum numerical factor by which square footage of a zoning lot on which a building is to stand may be multiplied to determine the amount of useable floor area that may be constructed on the lot (ZR12-10 Floor area ratio). The subject district is zoned at 15 FAR and subject to no cap pursuant to ZR74-79; however, CPC's action on the application was appropriately subjected to the pertinent ZR74-792(5) criteria:

> 5. As a condition of permitting such transfers of development rights, the Commission shall make the following findings:

> (a) That the permitted transfer of floor area or variations in the front height and setback regulations will not unduly increase the bulk of any new development, density of population or intensity of use in any block to the detriment of the occupants of buildings on the block or nearby blocks, and that any disadvantages to the surrounding area caused by reduced access of light and air will be more than offset by the advantages of the landmark's preservation to the local community and the City as a whole, and
>
> (b) that the program for continuing maintenance will result in the preservation of the landmark.
>
> . . .
>
> The City Planning Commission shall give due consideration to the relationship between the landmark building and any new buildings developed on the adjacent lot regarding materials, design, scale, and location of bulk.
> The Commission may prescribe appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area.

Thus, the proposed 74 story building, which is at 33.15 FAR more than twice the as of right bulk in this extremely congested area, was found not to be in compliance with ZR74-792(5)(a) on grounds of excessive bulk and density. In addition, on these papers defendants have shown that there was a rational basis for finding that the program for continuing maintenance for preservation of the landmark (ZR74-792 [5][b]) was inadequate and that the environmental review of 383's project was not biased, arbitrary and capricious or in violation of due process—on the contrary, the numerous adverse impacts found upon conclusion of the environmental review pro-

cedures pursuant to SEQRA and CEQR and disapproved under ULURP had a rational basis.

The Court has reviewed and found baseless and without merit the remaining contentions asserted by 383, including such constitutional claims as, inter alia, the denial of substantive due process. On its cross-motion for a continuance to permit disclosure pursuant to CPLR 3212(f) plaintiff has failed to demonstrate the circumstances necessitating discovery and to indicate the valid and material matters to be discovered. Thus the cross-motion is unavailing to defeat summary judgment (*Chemical Bank* v. *PIC Motors Corp.*, 58 NY2d 1023, 1026). Nor has 383 shown the existence of any triable factual issues.

Accordingly, summary judgment is granted to the extent of declaring judgment in defendants' favor as to the eligibility of the 383 Property as a receiving site for Terminal TDRs, as well as on the substantive due process claim and other constitutional claims asserted, and in all other respects the complaint is dismissed.

Settle judgment accordingly.

Dated: August 6th, 1991

/s/ E.T.N.
J.S.C.

APPENDIX D

CITY PLANNING COMMISSION

August 23, 1989/Calendar No. 32

C 870193 ZSM

IN THE MATTER OF an application submitted by the New York and Harlem Railroad Company and 383 Madison Avenue Associates/First Boston, Inc. for the grant of a special permit pursuant to Sections 197-c and 200 of the New York City Charter and Section 74-79 of the Zoning Resolution to allow the transfer of development rights (787,335 square feet) from a lot occupied by Grand Central Terminal, a landmark building, to a lot bounded by Madison Avenue, East 46th Street, Vanderbilt Avenue and East 47th Street (Block 1282, Lot 21), and allow the maximum permitted floor area on such lot to be increased on the basis of such transfer of development rights to facilitate the development of a 74-story office building on the above-mentioned lot in a C5-3 district, within the Special Midtown District, Borough of Manhattan, Community District 5.

The application for the special permit was filed by the New York and Harlem Railroad Company and 383 Madison Avenue Associates/First Boston, Inc., on August 28, 1986 to permit the transfer of 787,335 square feet from a lot occupied by Grand Central Terminal to a lot bounded by Madison Avenue, East 46th Street, Vanderbilt Avenue and East 47th Street, pursuant to Section 74-79 of the Zoning Resolution, to allow the maximum permitted floor area ratio on such lot to be increased from 15 to 33.15 FAR on the basis of such transfer of development rights.

BACKGROUND

Original Application

The application for 383 Madison Avenue was submitted to the City Planning Commission on August 28, 1986 and included the following proposed actions:

C 870193 ZSM—To permit the transfer of 787,335 square feet of floor area from Grand Central Terminal to 383 Madison Avenue, a modification of height and setback regulations to permit the street wall of the proposed building along Vanderbilt Avenue to be increased 10 feet above the maximum permitted 90-foot height limit, and an authorization to waive retail continuity regulations of Section 81-42 of the Zoning Resolution.

N 870194 ZRM—A text amendment to Section 81-44 of the Zoning Resolution which would permit curb cuts for loading docks on all Midtown avenues which are less than 75-feet wide (including Vanderbilt Avenue).

N 870195 ZRM—A text amendment to Section 81-42 of the Zoning Resolution which would permit the City Planning Commission to authorize waivers of retail requirements on certain designated midtown avenues when certain pedestrain- oriented transit improvements were included as part of the project.

Prior to certification, the proposal and applications were revised as follows:

- Curb cuts for loading docks, originally proposed to be located on Vanderbilt Avenue, were relocated to East 46th and East 47th Streets. With this revision, the proposed text amendment to permit curb cuts on Vanderbilt Avenue and other narrow Midtown avenues was unnecessary, and the application for this text amendment (N 870194 ZRM) was withdrawn on March 29, 1988.

- The proposed height of the street wall along Vanderbilt Avenue was reduced from 100 feet to 90 feet, eliminating the need for the requested height and setback modification. This request was withdrawn on March 29, 1988.

During the course of the Uniform Land Use Review Procedure, the applicant withdrew the proposal for the text change to permit the Commission to authorize waivers of retail requirements and the request for the authorization. The applicant revised building plans to bring the project into conformance with Section 81-42 as currently written, removing the need for these actions.

Previous Governmental Actions Concerning Grand Central Terminal

Grand Central Terminal was designated a New York City Landmark by the Landmarks Preservation Commission on August 2, 1967, and this designation was confirmed by the New York City Board of Estimate on September 21, 1967.

In 1979, the City Planning Commission and Board of Estimate approved a special permit (780404 ZSM) pursuant to Section 74-79, allowing the transfer of 74,665 square feet of development rights from the Terminal to Philip Morris, Incorporated, for a 26-story office development across from the Terminal at East 42nd Street and Park Avenue. That development, which included a Covered Pedestrian Space and an improved connection to adjacent transit facilities, contains 448,000 square feet of floor area and the FAR is not quite 21.6.

In 1982, the New York City Planning Commission enacted the Midtown Special District which reduced the maximum permitted density without a special permit in East Midtown, including the Grand Central area, from 18 FAR (15 FAR as-of-right plus 3 FAR bonus) to 16 Far (15 FAR as-of-right plus 1 FAR bonus).

Report of the Landmarks Preservation Commission

Pursuant to Section 74-791 of the Zoning Resolution, a report from the Landmarks Preservation Commission is required as part of the application. On October 14, 1987, the Landmarks Preservation Commission adopted and forwarded to the City Planning Commission a report on this proposal which found that due to the proposal's location, four blocks from Grand Central Terminal, the proposal's architectural relationship to the Terminal could not be evaluated; and that an adequate program for the continuing maintenance of the Terminal had not been provided.

Pre-Certification Lawsuit

While the Draft Environmental Impact Statement (DEIS) was being prepared and reviewed, the co-applicants brought an Article 78 proceeding in State Supreme Court, seeking an order that the DEIS be certified so the public review process could begin. Pursuant to the judgment of the Supreme Court, New York County, entered June 6, 1988, as affirmed by Order of the Appellate Division, First Department, entered November 1, 1988, motion for leave to appeal to the Court of Appeals, denied April 4, 1989 ("Court Order"), the Planning Commission certified the ULURP applications as complete and officially referred them to the appropriate community boards. In certifying the DEIS and the applications, both the Departments of Environmental Protection and City Planning and the City Planning Commission, respectively, stated their beliefs that, for reasons stated in the Record on Appeal, the documents were not complete.

PROJECT DESCRIPTION

The basic maximum floor area permitted on the site of 383 Madison Avenue is 649,665 square feet (43,211-square-foot lot area × 15 FAR). The applicant seeks to add an additional 787,335 square feet of floor area by

transferring development rights from Grand Central Terminal to permit a development with a maximum of 1,437,000 square feet of floor area.

The project under consideration is a 74-story, 1,029-foot-high office building located on the block bounded by Madison Avenue, Vanderbilt Avenue, and East 46th and East 47th streets in Midtown Manhattan. The net zoning floor area of the building under consideration is 1,435,620 square feet (33.15 FAR). Total gross floor area above grade is 1,606,024 square feet which includes 124,900 square feet for mechanical floor area (eight percent of the total floor area). The applicant has requested permission to transfer floor area above the amount specified for the actual building shown on submitted plans to permit some flexibility in laying out deductible mechanical floor area. The difference between the maximum permissible building using the transfer of development rights (1,437,000 square feet) and the proposed building as shown on plans (1,435,620 square feet) is 1,380 square feet.

Within the building, there would be nine trading and related support trading floors, 54 office floors, six floors for "skylobbies" and accessory commissary uses and four floors for primarily mechanical uses. The ground floor would be used for circulation, access and loading docks for the building and would include 5,804 square feet of retail space as required under Section 81-42 of the Zoning Resolution.

Subsequent to certification, the applicants revised the application to bring the proposed building into compliance with Section 81-40 and 81-42 of the Midtown Special District. These revisions included the addition of retail uses along Madison Avenue, an arcade of 3,012 square feet along Madison Avenue and corner arcades of 999 square feet each at the intersections of both East 46th and East 47th streets and Vanderbilt Avenue. With these revisions, the applicant proposed to use 1,435,620 square feet of the total requested proposed maximum floor area.

Below grade, there would be two levels, a concourse level and a sub-basement. The concourse level would include some retail uses and proposed connections to future transit improvements which are discussed below. The project would include two curb cuts for service to loading docks, one each on East 46th and East 47th streets.

As part of the project, the applicant has proposed several pedestrian circulation improvements including a stairway and escalator connection from the concourse level of the building to the East 47th Street passageway of the Grand Central Terminal North End Access Project. The North End Access Project, proposed by Metro-North and intended to be publicly funded, would develop a network of passageways to allow direct access to Metro-North commuter rail platforms from Park Avenue. The MTA and Metro-North are assembling a funding package, and construction would not start until funding had been secured. Application plans also show a proposed extension of the existing Roosevelt Passageway connection with Grand Central Terminal. The proposed extension would lengthen the existing passageway by one block and would include a stairway entrance to the tunnel at the corner of Vanderbilt Avenue and East 46th Street within the property line within the corner arcade. The applicant has indicated that it would construct and maintain this extension.

ENVIRONMENTAL REVIEW

This application (C870193 ZSM), was reviewed pursuant to the New York State Environmental Quality Review Act (SEQRA), and the SEQRA regulations set forth in Volume 6 of the New York Code of Rules and Regulations, Section 617.00 *et seq.*, and the New York City Environmental Quality Review (CEQR) procedures set forth in Executive Order 91 of 1977. The designated CEQR number is 85-098M.

The applicant prepared a Draft Environmental Impact Statement (DEIS) which was certified as complete on

April 17, 1989 by the Department of Environmental Protection and the Department of City Planning pursuant to Court Order. Pursuant to the SEQRA regulations and the CEQR procedures, a joint public hearing was held on the DEIS on July 26, 1989. The public hearing was held in conjunction with the public hearing on the related Uniform Land Use Review Procedure (ULURP) item (C 870193 ZSM). The Final Environmental Impact Statement (FEIS) was completed, and a Notice of Completion of the FEIS was issued on August 12, 1989. The Notice of Completion for the FEIS identified the following potential significant adverse effects, and the proposed mitigation measures as well as those adverse impacts for which no mitigation measures were feasible.

Historic Resources

The program of continuing maintenance of the Terminal would not be adequate as proposed, due to lack of an effective means of ensuring provision of cyclical conditions reports, work programs, or regularly scheduled maintenance reports. Neither the Landmarks Preservation Commission (LPC), nor the owner, therefore, can be assured that potential problems which might be identified in such reports will be corrected, nor can an adequate basis be provided on which the Chairman of LPC can make recommendations for expenditures of the income or corpus of the Trust fund. This situation cannot be readily changed because of the existing lease with the Metropolitan Transportation Authority. (The Zoning Resolution requires the City Planning Commission to find that an adequate maintenance plan exists as a condition of transfer of the TDRs.)

Urban Design, Visual Impacts, and Neighborhood Character

There would be a significant increase in building height and bulk on the site as a result of the proposed project.

Buildings in the immediate vicinity of the site to the east, south, and west are for the most part older and considerably lower. The proposed project would be significantly taller than most of the surrounding structures and, therefore, would be inconsistent with the existing neighborhood character.

Shadows

Existing shadow patterns would increase with the greater penetration by the proposed building of the sky exposure plane. Although most of the new shadows would fall on the roofs and sides of existing buildings, additional shadow coverage would occur at street level. Sections of Madison Avenue, Park Avenue, 46th Street, and 47th Street would be additionally shaded. The plaza of 345 Park Avenue, a public open space, would be significantly affected for about one and one-half hours during the spring and fall months, and a portion of the 48th Street plaza of Tower 49 would also be affected for about one hour during those months. Shadows reaching other open spaces in the area would be incorporated in intervening shadows from other buildings.

Open Space and Recreational Facilities

The study area's worker population of approximately 697,000 employees would increase by approximately 4,900 with the proposed development. This increase in the number of employees would increase open space demands of the daytime population, thereby exacerbating the existing gross deficiency of open space in the area and resulting in a significant negative impact on open space. The proposed building will provide no additional public outdoor open space.

Traffic

The project would result in 57 significant impacts; 29 links during the AM peak, 4 links during the mid-day peak, and 24 links during the PM peak. Additionally, the

project would result in significant worsenings at 4 locations; 2 during the AM peak and 2 during the PM peak.

At . . . seven of those locations, the project induced significant impacts that are both unmitigated and unmitigatable as listed below:

Fifth Avenue SB at 47th Street (AM Peak Hour)*
Fifth Avenue SB at 42nd Street (AM Peak Hour)*
47th Street WB at Fifth Avenue (AM Peak Hour)*
45th Street WB at Lexington Avenue (AM Peak Hour);
Fifth Avenue SB at 46th Street (PM Peak Hour);
48th Street EB at Fifth Avenue (PM Peak Hour);* and
47th Street WB at Fifth Avenue (PM Peak Hour)*

(the asterisks indicate that Traffic Enforcement Agents are currently posted at these locations.)

For the remaining 50 locations the following mitigation measures are proposed for the significant traffic impacts projected as a result of the impact assessment. These proposed mitigations assume that the 42nd Street Transitway project is not implemented.

Signal retimings of one second are required at the following intersections in the morning peak period:

Lexington Avenue at 44th Street;
Fifth Avenue at 48th, 45th, 44th, 41st, 57th to 49th Streets
Sixth Avenue at 43rd, 44th, and 45th Streets;
48th Street at Park Avenue and 3rd Avenue;
47th Street at Park Avenue;
46th Street at Lexington Avenue;
45th Street at Lexington Avenue;
42nd Street at Vanderbilt and Lexington Avenues; and
41st Street at Lexington Avenue

Signal retimings of two seconds are required at the following intersection in the morning peak period:

Fifth Avenue at 46th Street.

Signal retimings of one second are required at the following locations during the midday peak period:

48th Street at Park Avenue;
46th Street at Madison Avenue; and
48th Street at 3rd Avenue.

Signal retimings of one second are required at the following intersections during the afternoon peak period:

Lexington Avenue at 42nd Street;
Madison Avenue at 49th Street;
Fifth Avenue at 46th, 45th, 44th, 43rd, 42nd, 41st, and 40th to 38th streets;
48th Street; at Park, Fifth and Third Avenues;
47th Street at Park and Fifth Avenues;
46th Street at Madison, Lexington, and Third and Fifth Avenues; and
41st Street at Lexington Avenue.

The above re-timing actions generally would be shifts of signal timing from the intersection approaches which have excess green time to the approaches requiring additional capacity. With the 42nd Street Transitway in place, the project-generated vehicular traffic would result in significant traffic impacts on 24 links during the AM peak hour, 2 links in the Midday peak hour, and 21 links in the PM peak hour (as compared with 29, 3, and 29 links without the 42nd Street Transitway during the AM, Midday, and PM peak hours, respectively) . . . .

Pedestrian

A significant impact on the Roosevelt passageway at the revolving door would result from increased pedestrian traffic to Grand Central Station's subways and Metro-North commuter trains.

There would also be significant impacts during maximum surges in the crosswalks adjacent to the proposed building during all peak hours which could be mitigated by widening the crosswalks.

Air Quality

The project as proposed would result in significant adverse impacts due to carbon monoxide emissions. New violations of the Clean Air Act would be caused by the project and would exacerbate existing violations.

With the proposed project and with proposed traffic mitigations, receptors at the following six locations would not be in compliance with the State Implementation Plan (SIP). Those with asterisks (*) would also become new "hot spots." The other three locations are currently designated as hot spots.

Madison Avenue between 44th and 50th Streets.
Fifth Avenue between 46th and 47th Streets.*
Fifth Avenue and 47th Street (intersection).
Fifth Avenue and 46th Street (intersection).*
47th Street between Lexington and Fifth Avenues.*
46th Street between Lexington and Fifth Avenues.

Receptors at the following three locations remain in compliance with the State Implementation Plan with the proposed project.

Vanderbilt Avenue between 46th and 47th Street.
47th Street between Fifth and Sixth Avenue.
46th Street between Sixth and Fifth Avenue.

With respect to the New York City's criteria, the air quality analysis shows that the *de minimis* increment (of 0.5 ppm) would be exceeded at six of the nine air quality sites analyzed and that mitigation would be required at these locations. A mitigation analysis showed, however, that readily available mitigation measures would not be effective in fully mitigating these impacts. Therefore,

these significant impacts are unmitigated and unmitigatable, and the project with mitigation would not be in conformance with the SIP.

Beneficial Impacts

The proposed project would generate a substantial number of jobs for the City during construction, and a substantial number of permanent jobs. The proposed project would also raise tax revenues for New York City and State.

UNIFORM LAND USE REVIEW

This application was certified by the City Planning Commission on April 17, 1989, pursuant to Court Order, and was duly referred to Community Board 5 in Manhattan along with the related non-ULURP text change application (N 870195 ZRM) in accordance with Article 3 of the Uniform Land Use Review Procedure (ULURP) rules. The proposed text change would allow the City Planning Commission to authorize waivers of requirements for retail uses along certain avenues in the Midtown Special District.

This non-ULURP text change was also sent to Community Boards 4, 6, and 8 and the Manhattan Borough Board for their information and review.

Community Board Public Hearing

Community Board 5 held a public hearing on this application on June 8, 1989 and adopted a resolution recommending disapproval by a vote of 23 in favor and none in opposition with 3 abstentions. Community Board 5 opposed the project because the proposed transfer does not meet the requisite findings of Section 74-79 in that it does unduly increase the bulk, the density of population and the intensity of use; that it does not have a program for continuing maintenance and therefore cannot result in the preservation of the landmark; and that

the disadvantages to the surrounding area are extreme. Although Community Board 5 had supported other transfers under Section 74-79 in the past as valuable tools in the preservation of landmarks, in the absence of any plan to preserve the landmark, it found that the disadvantages cannot be said to be offset by any such plan.

Because the proposed text change (N 870195 ZRM) was withdrawn before the community board held its public hearing, it was not reviewed or considered.

City Planning Commission Public Hearing

On June 19, 1989 (Calendar No. 11), the City Planning Commission scheduled July 5, 1989 for a public hearing on this application (C 870193 ZSM). The hearing was duly held on July 5, 1989 (Calendar No. 43). The hearing was continued on July 26, 1989 (Calendar No. 53).

At the July 5 hearing there were three speakers in favor of the application and none in opposition.

A speaker representing the New York and Harlem Railroad Company, the owner of Grand Central Terminal and co-applicant, asserted that the company had a constitutionally protected right to realize the value of the Terminal's development rights and that the applicants have attempted to negotiate with the city to develop an alternative plan designed to accommodate both the needs of the city and to realize the value of the Terminal's development rights. In response to the community board's assertion that the proposed building is too big, the speaker said that no development rights would be created and that new bulk would not be added to the community. Instead, he argued that the application seeks only to transfer development rights which currently exist and which could have been used at the Terminal site itself were it not landmarked. In response to assertions by DCP staff that the site at 383 Madison is not an eligible receiving site for the transfer of development rights from

Grand Central Terminal under Section 74-79 of the Zoning Resolution, the speaker disagreed with the department's position that subsurface fee ownership of parcels between the Terminal and the development site does not constitute the chain-of-ownership required under Section 74-79. The speaker reiterated the railroad's position that the sub-surface fees have been used for railroad purposes, have been recognized as tax lots, and have been leased to third parties, and consequently are lots under Section 74-79.

The speaker also disagreed with the conclusion of the Landmarks Preservation Commission relating to the continuing maintenance of Grand Central Terminal and the applicants' proposed maintenance plan. The speaker asserted that the applicants' proposed plan, which contributes additional money to a previously existing fund established in 1979, was adequate.

The speaker submitted a statement and supporting documents which further detailed these arguments.

A second speaker, representing 383 Madison Associates, the developer of 383 Madison and a co-applicant, also expressed his concern that the Terminal's owner not be denied the use of development rights from Grand Central, adding that there should be just compensation if use is denied. The speaker asserted that the approximately 1.7 million square feet of Grand Central Terminal's development rights must be placed somewhere and that the resulting overall density of the neighborhood would not be greater no matter how the development rights are dispersed. The speaker also noted that the applicants' proposed maintenance plan, which consists of a contribution to a maintenance plan previously approved by the Landmarks Preservation Commission and the City Planning Commission in 1979, should be considered acceptable today. The speaker also asked the City Planning Commission to prepare and make public plans for distributing the 1.7 million square feet of the Terminal's development rights.

The third speaker, also a representative of the developer, asked the Commission and department to make public the reasoning behind department staff position that the site at 383 Madison was not eligible to receive the transfer of development rights from Grand Central Terminal.

The hearing was continued until July 26, 1989 (Calendar No. 51). At the hearing on July 26, 1989 there were no speakers, and the hearing was closed.

CONSIDERATION

After considering the eligibility and merits of the application, the Commission has determined that it cannot approve this project. The Commission notes that these issues of eligibility and merit have been long outstanding and have been raised by the community board, the Landmarks Preservation Commission, the Department of City Planning and the Law Department well prior to certification of this application.

Subsequent to certification, the project was found to have omitted pedestrian circulation elements required by Section 81-40 of the Zoning Resolution (Mandatory District Plan Elements of the Midtown Special District). Additionally, during the course of the Uniform Land Use Review Procedure, the application withdrew the proposal for the text change and the request for the authorization. The applicant revised building plans to bring the project into conformance with Section 81-42 as currently written, removing the need for these actions.

The Commission also notes that at certification the Draft Environmental Impact Statement was, in the opinion of the Departments of Environmental Protection and City Planning, incomplete and that considerable doubt had been established in terms of its accuracy, particularly with respect to traffic, transportation, noise and air quality. During the preparation of the Final Environmental Impact Statement, the applicant was required to submit completely new analyses for these and other issues. The

FEIS disclosed that the project would generate numerous significant environmental impacts which had not been identified in the Draft Environmental Impact Statement. These impacts are discused in the environmental portion of this report.

Ineligibility under Section 74-79 of the Zoning Resolution

The Commission has been advised by its Counsel that this application is not eligible under Section 74-79 because the underlying requirements of the section have not been met. We concur. The text of the Zoning Resolution permits the transfer of development rights from landmark sites to adjacent lots, which are defined in C5-3 and other zones where 15 FAR is permitted as lots ". . . across a *street* and opposite to another lot or lots which except for the intervention of *streets* or *street* intersections form a series extending to the lot occupied by the landmark *building or other structure*. All such lots shall be in the same ownership (fee ownership or ownership as defined under *zoning lot* in Section 12-10)." Thus, the basis of any application pursuant to this section is a series (or "chain") of common ownership between the landmark lot and the receiving lot, and none of the documentation submitted by the applicant proves that the requisite chain has been established.

At the pubilc hearing and in written submissions, the co-applicants have argued that 383 Madison Avenue is eligible as an adjacent lot to receive development rights from Grand Central Terminal because, in their view, subsurface "tax lots" qualify as lots within Section 74-79 and therefore, their ownership of a series of these subsurface tax lots between Grand Central Terminal and 383 Madison Avenue constitutes the requisite chain.

We do not agree with this position. Under the Zoning Resolution, it is zoning lots that are the essential means of regulating land use throughout the city. The primacy of the zoning lot concept is the backbone of the Resolution and the basic measure used in calculating compliance

with zoning. Development rights are attributes of the surface area of a zoning lot. Therefore, the consistent use of the term "lot" makes clear that the bulk calculations are based on the surface area of each tract of land, not the subsurface. We note that many of the Resolution's definitions, set forth in Section 12-10, incorporate the term "zoning lot" via a shorthand use of the term "lot." Examples of this drafting feature are the terms "lot area," "lot area per room," and "lot coverage."

The Commission also notes that there is no definition of the term "lot" and that when the Zoning Resolution refers to a tax lot, it uses the term "a lot of record," as in the Section 12-10 definition of zoning lot.

The Commission concludes that the drafters similarly used the term "adjacent lot" in Section 74-79, while intending it to mean "adjacent zoning lot." In analyzing whether there is a legally-complying chain of ownership of the intervening lots between the sending and receiving sites, therefore, our inquiry focuses on whether the relevant intervening zoning lots are in common ownership.

In this case, the ownership demonstrated is a series of subsurface fee interests which do not include rights to the surface of the land, and which do not otherwise join the parties-in-interest who control the ability to develop these lots in accordance with zoning. Staff has informed the applicant that the transfer would be eligible under Section 74-79 if the appropriate intervening parties-in-interest joined in the application as required by Section 12-10. The co-applicants have chosen not to join the parties-in-interest.

Based on the foregoing, the Commission concludes that the instant application does not qualify under Section 74-79 of the Zoning Resolution.

Planning Issues

In reviewing this application, the Commission carefully considered the planning and density issues that are raised by this application because these are matters which the

City Charter mandates as our responsibility. Even if the proposed transfer were legally eligible, we would nonetheless be compelled to deny the application because of the excessive bulk and density proposed.

The application requests the transfer of 787,335 square feet of development rights from Grand Central Terminal to be placed on top of the 649,665 square feet allowed at 383 Madison Avenue as-of-right. This transfer would result in a building with a maximum of 1,437,000 square feet or 33 FAR, more than twice the FAR permitted by the zoning in the Grand Central area. The Commission notes that before 1961, even when New York City's Zoning Code included no absolute controls limiting the density of commercial development, buildings were rarely constructed with densities greater than 25 FAR. In the Grand Central area the Chrysler Building, built in 1928, was the densest at 26 FAR.

The Grand Central district is one of the most heavily developed parts of Midtown, enjoying the benefits of easy accessibility by mass transit from other parts of the city and the region, and is a major generator of jobs for the entire city. The Commission recognizes that high density development within reasonably prescribed limits is appropriate for the Grand Central district and contributes to its continued vitality.

However, the Commission has had a long and firm record of placing maximum limits on permissible density in Midtown and throughout the city, based on its historical concern about the ill effects of excessive congestion and over-crowding.

In 1961, the City Planning Commission revised zoning in Midtown Manhattan to include density controls which placed a maximum as-of-right-density of 15 FAR to limit over-building, particularly in the Midtown Manhattan core and the Grand Central area where most post-war construction was occurring. These overall limits were seen as a way of encouraging office development to spread

to a wider area of the Central Business District and relieve pressure on overburdened transit facilities.

The Commission permitted greater densities only through floor area bonuses with a maximum of 18 FAR for providing plazas and street level open spaces to bring light and air into streets surrounded by tall buildings and to provide a more attractive and open street environment.

Subsequently, in the late 1960s and 1970s, the Commission introduced Special Purpose Districts in Midtown and elsewhere throughout the city to address planning and urban design issues particular to specific settings. In Midtown, the Theatre District and the Fifth Avenue District permitted densities up to 21.6 FAR, the highest in the city, only if various specific designated amenities were provided.

In 1982, when the City Planning Commission developed the Midtown Special District, the Commission designated East Midtown as an area for "stabilization," lowering the permitted density in Midtown from a maximum 18 FAR (15 FAR as-of-right plus 3 FAR bonus) to 16 FAR (15 FAR as-of-right plus 1 FAR bonus), a reduction of 2 FAR, and in certain parts of East Midtown, from 18 FAR to 13 FAR (12 FAR as-of-right plus 1 FAR bonus). The Commission undertook this action to relieve development pressures and ease congestion and overcrowding in East Midtown. The Commission reaffirmed its policy on limiting density as recently as 1988 when it reviewed the Midtown District, confirming that many of the district's goals were being met, including a shift of development from East Midtown to the West Side.

Notwithstanding the Commission's authority under Section 74-79 to permit the transfer of development rights without limits as to density, the Commission has never approved a development in Midtown whose density is greater than 21.6 FAR over a single zoning lot. (The

Philip Morris Building, which incorporates the first development rights transfer from Grand Central Terminal, was approved with a maximum density no greater than 21.6 FAR.) Nor can the Commission contemplate reversing itself on its stabilization policy by permitting a 33.15 FAR building without due and careful consideration of its implications for East Midtown and the Grand Central area.

At the public hearing, the applicant stated that the proposal effectively created no new floor area, and introduced no additional density to the neighborhood beyond that contemplated by the Commission when the area was rezoned in 1982. The Commission understands this assessment but notes that the issue here is not the addition of new floor area to the neighborhood, but its severe concentration at one location, and on one relatively small site. With this proposal, 4,900 workers and visitors (twice the number an as-of-right building would house) will add to already existing congestion in this area. While the applicant has proposed steps to alleviate this problem for its own block by providing an arcade along Madison Avenue, corner arcades on East 47th and East 46th streets at Vanderbilt Avenue, and two transit connections for building occupants and the general public, the additional congestion created by this building would spill over to crosswalks, other blocks, and already congested transit facilities in the neighborhood. The proposal to extend the Vanderbilt Passageway as a way of alleviating some of this sidewalk congestion does not recognize that the passage is already congested at peak hours.

The Commission is unable to make the finding which is a prerequisite to the grant of a special permit under Section 74-791 (5)(a) of the Zoning Resolution, "that the permitted transfer of *floor area* . . will not unduly increase the *bulk* of any new *development*, density of population or intensity of use in any *block* to the detriment

of the occupants of *buildings* on the *block* or *nearby blocks*, . . ."

Environmental Issues

The Commission notes that the FEIS discloses that the project would create significant adverse impacts, some of which cannot be mitigated. We are particularly concerned that, as stated in the Notice of Completion, at seven locations, the traffic impacts area unmitigatable and that the project "would result in significant adverse impacts due to carbon monoxide emissions," creating new violations of the Clean Air Act that "would exacerbate existing violations." The Commission notes that the project, with the proposed traffic mitigation, would not conform with the State Implementation Plan (SIP), as three locations would become "hot spots." The Commission is also concerned that a building as high as that proposed "would be inconsistent with the existing neighborhood character," that the proposed building would exacerbate the "existing gross deficiency of open space in the area . . . resulting in a significant negative impact on open space," and that, "significant impact on the Roosevelt passageway at the revolving door would result from increased pedestrian traffic to Grand Central Terminal's subways and Metro-North Commuter trains."

The Commission is aware that the applicants have submitted additional proposals for mitigation; however, the CEQR staff found that there was no factual basis from which to conclude that these proposed measures would be effective.

Landmarks Report

The Commission has reviewed the report of the Landmarks Preservation Commission dated October 14, 1987 which expressed concerns regarding the lack of an adequate program for continuing maintenance to assure the preservation of the landmark. The applicants' proposed

program, which has not been revised since the Landmarks Preservation Commission and Community Board 5 expressed their concerns in 1987, consists primarily of a fund to be contributed to the Grand Central Terminal Trust by the owners of the Terminal, in the amount of five percent of the total payment received from the developer for the purchase of development rights. This Trust was established in 1979 to receive funds from the sale of 75,000 square feet of development rights from Grand Central Terminal to Philip Morris, Incorporated, for a 26-story office building at Park Avenue and East 42nd Street. The Trust's purpose is to provide funds for certain maintenance and repairs of the Terminal which are in the interest of its preservation. In addition to the creation of the Trust, Penn Central, as owner of the landmark, agreed to preserve and maintain the landmark in accordance with the landmarks preservation law, to enforce provisions of its lease with the MTA (lessee of the Terminal and responsible for its maintenance) to maintain the Terminal and to request that the MTA regularly submit work programs to the owner and Landmarks Preservation Commission for their review. The Landmarks Preservation Commission noted in its October 14, 1987 report that no work programs or reports had been submitted to the Landmarks Preservation Commission, stating that, ". . . in the absence of a clear process whereby the [Landmarks Preservation] Commission is provided with a present conditions report, work program and regularly scheduled maintenance reports neither it, nor the owner, can be assured that potential problems which might be identified in such reports are addressed and corrected." Penn Central's contribution to the Trust in 1979, representing five percent of the total funds realized from the transfer of development rights from Grand Central Terminal, was approximately $112,000. The current application, also a contribution of five percent of the funds realized from the proposed transfer, would involve a contribution of approximately $2,200,000.

The City Planning Commission concurs with the Landmarks Preservation Commission's finding ". . . that the program for continuing maintenance based solely on a further contribution of five percent of the proceeds to the Trust and confirmation that [Penn Central] shall continue to enforce the maintenance provisions of the MTA lease . . . without indicating how it intends to implement the confirmation, is not sufficient to assure the preservation of the Landmark." The City Planning Commission, which must weigh the benefits of the landmark's preservation against the disadvantages of the concentration of excess bulk and density and must determine whether the application includes a maintenance program, cannot find either that the preservation program as presented, offsets the disadvantages to the surrounding area, or that there is a program that will result in the preservation of the landmark.

The Commission has, for some time, recognized the necessity of formulating a comprehensive planning framework in the Grand Central area which would guide development in a manner appropriate to the scale and character of the area and would build upon and enhance the area's transit and transportation infrastructure. The Commission envisions a planning framework that would also reflect the development rights that now exist at the landmark Grand Central Terminal. Staff has been working on the development of such a framework and is preparing a discussion document for public comment.

FINDINGS

Pursuant to Section 74-79 of the Zoning Resolution, the City Planning Commission may permit the transfer of development rights to an adjacent lot, if it makes the following findings:

> "(a) That the permitted transfer of *floor area* or variations in the front height and setback regulations will not unduly increase the *bulk* of any new *devel-*

opment, density of population or intensity of use in any *block* to the detriment of the occupants of *buildings* on the *block* or *nearby blocks*, and that any disadvantages to the surrounding area caused by reduced access of light and air will be more than offset by the advantages of the landmark's preservation to the local community and the City as a whole, and

(b) that the program for continuing maintenance will result in the preservation of the landmark.

(c) That in the case of landmark sites owned by the City, State or Federal Government, transfer of *development* rights shall be contingent upon provision by the applicant of a major improvement of the public pedestrian circulation or transportation system in the area."

An adjacent lot is one ". . . which is across a *street* and opposite to another lot or lots which except for the intervention of *streets* or *street* intersections form a series extending to the lot occupied by the landmark *building or other structure*. All such lots shall be in the same ownership (fee ownership or ownership as defined under *zoning lot* in Section 12-10)."

The Commission finds that 383 Madison Avenue is not an adjacent lot and that the application is not legally eligible because it does not meet the requisite ownership requirements. The Commission is unable to make findings (a) and (b) of Section 74-79 and finds that the transfer of 787,335 square feet of floor area from Grand Central Terminal to the site at 383 Madison Avenue would unduly increase the bulk, density of population and intensity of use to the detriment of the occupants of buildings on nearby blocks, and that the disadvantages to the surrounding area caused by reduced access to light and air are not offset by the advantages of the landmark's preservation to the local community and the city as a whole, and that the proposed program for continuing

maintenance does not result in the preservation of the landmark. Finding (c) of Section 74-79 does not apply.

RESOLUTION

RESOLVED, that having considered the Final Environmental Impact Statement, for which a Notice of Completion was issued on August 12, 1989, with respect to this application (CEQR No. 85-098M), the City Planning Commission finds that the proposed actions do not sufficiently minimize or avoid adverse environmental impacts and that the potential mitigative measures that have been identified are only capable of mitigating a portion of the disclosed adverse impacts.

Based on the environmental determinations and the consideration described in this report, the Commission has determined that this application does not warrant approval, and adopted the following resolution on August 23, 1989 (Calendar No. 32).

RESOLVED, by the City Planning Commission, pursuant to Sections 197-c and 200 of the New York City Charter, that the application (C870193 ZSM) for the grant of a special permit pursuant to Section 74-79 of the Zoning Resolution to allow the transfer of development rights (787,335 square feet) from a lot occupied by Grand Central Terminal, a landmark building, to a lot bounded by Madison Avenue, East 46th Street, Vanderbilt Avenue and East 47th Street (Block 1282, Lot 21), and allow the maximum permitted floor area on such lot to be increased on the basis of such transfer of development rights to facilitate the development of a 74-story office building on the above-mentioned lot in a C5-3 district, within the Special Midtown District, Borough of Manhattan, Community District Five is DISAPPROVED.

Pursuant to Section 200 of the New York City Charter, the action by the City Planning Commission in this mat-

ter is final. The report is forwarded to the Secretary of the Board of Estimate for information and filing.

Sylvia Deutsch, Chairperson
Denise M. Scheinberg, Vice-Chairperson
Salvatore C. Gagliardo, Marilyn Mammano, William Garrison McNeil, Daniel T. Scannell, Commissioners

APPENDIX E

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of September 1993

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding*

Mo. No. 1023 SSD 59

383 MADISON ASSOCIATES,
Appellant,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

/s/ Stuart M. Cohen
STUART M. COHEN
Deputy Clerk of the Court

APPENDIX F

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eleventh day of January 1994

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding*

1-14 Mo. No. 1250

383 MADISON ASSOCIATES,
Appellant,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Judge Titone took no part.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

APPENDIX G

ZONING RESOLUTION PROVISIONS INVOLVED

74-79

Transfer of Development Rights from Landmark Sites

In all districts except R1, R2, R3, R4, or R5 Districts or C1 or C2 Districts mapped within such districts, for new *developments* or *enlargements*, the City Planning Commission may permit *development* rights to be transferred to adjacent lots from lots occupied by landmark *buildings or other structures*, may permit the maximum permitted *floor area* on such adjacent lot to be increased on the basis of such transfer of development rights, may permit, in the case of residential *developments* or *enlargements*, the minimum required *open space* or the minimum *lot area per room* to be reduced on the basis of such transfer of development rights, may permit variations in the front height and setback regulations and the regulations governing the size of required loading berths, and minor variations in *plaza, arcade* and *yard* regulations, for the purpose of providing a harmonious architectural relationship between the *development* or *enlargement* and the landmark *building or other structure*.

. . .

For the purposes of this Section, the term "adjacent lot" shall mean a lot which is contiguous to the lot occupied by the landmark *building or other structure* or one which is across a *street* and opposite to the lot occupied by the landmark *building or other structure* or, in the case of a *corner lot*, one which fronts on the same *street* intersection as the lot occupied by the landmark *building or other structure*. It shall also mean in the case of lots located in C5-3, C5-5, C6-6, C6-7 or C6-9 Districts a lot contiguous or one which is across a *street* and opposite to another lot or lots which except for the intervention of *streets* or street intersections form a series extending to

the lot occupied by the landmark *building or other structure*. All such lots shall be in the same ownership (fee ownership or ownership as defined under *zoning lot* in Section 12-10).

. . .

The grant of any special permit authorizing the transfer and use of such *development rights* shall be in accordance with all the regulations set forth in Sections 74-791 (Requirements for application), 74-792 (Conditions and limitations), and 74-793 (Transfer instruments and notice of restrictions).

74-791

Requirements for application

An application to the City Planning Commission for a grant of a special permit to allow a transfer of development rights and construction based thereon shall be made by the owners of the respective *zoning lots* and shall include: a site plan of the landmark lot and the adjacent lot including plans for all development on the adjacent lot; a program for the continuing maintenance of the landmark; and such other information as may be required by the City Planning Commission. The application shall be accompanied by a report from the Landmarks Preservation Commission.

A separate application shall be filed for each independent "adjacent lot" to which development rights or [sic] being transferred under this Section.

74-792

Conditions and limitations

. . .

3. When "adjacent lots" are located in C5-3, C5-5, C6-6, C6-7 or C6-9 districts and are to be developed with

commercial buildings the following conditions and limitations shall apply:

(a) the maximum amount of *floor area* that may be transferred from any *zoning lot* occupied by a landmark building, shall be the maximum *floor area* allowed by Section 33-120.5 for *commercial buildings* on said landmark *zoning lot*, as if it were undeveloped, less the total *floor area* of all existing buildings on the landmark *zoning lot*.

(b) for each such adjacent *zoning lot* the increase in *floor area* allowed by the transfer of development rights under this Section shall be over and above the maximum *floor area* allowed by the applicable district regulations.

(c) the Commission may require where appropriate, that the design of the *development* include provisions for public amenities such as, but not limited to, open public spaces, subsurface pedestrian passageways leading to public transportation facilities, plazas and arcades.

. . .

5. As a condition of permitting such transfers of development rights, the Commission shall make the following findings:

(a) That the permitted transfer of *floor area* or variations in the front height and setback regulations will not unduly increase the *bulk* of any new *development*, density of population or intensity of use in any *block* to the detriment of the occupants of *buildings* on the *block* or *nearby blocks*, and that any disadvantages to the surrounding area caused by reduced access of light and air will be more than offset by the advantages of the landmark's preservation to the local community and the City as a whole, and

(b) that the program for continuing maintenance will result in the preservation of the landmark.

(c) That in the case of landmark sites owned by the City, State or Federal Government, transfer of *development* rights shall be contingent upon provision by the applicant of a major improvement of the public pedestrian circulation or transportation system in the area.

The City Planning Commission shall give due consideration to the relationship between the landmark building and any new *buildings* developed on the adjacent lot regarding materials, design, scale, and location of *bulk*.

The Commission may prescribe appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area.

MAXIMUM FLOOR AREA ALLOWANCES FOR SPECIFIED FEATURES AND MAXIMUM FLOOR AREA RATIOS BY UNDERLYING DISTRICTS

(Section 81-211)

	Means for Achieving Permitted FAR Levels on a Zoning Lot	MAXIMUM FLOOR AREA RATIO (FAR)				
		C5-P	C6-4 C6-5 M1-6	C5-2.5 C6-4.5 C6-5.5 C6-6.5	C6-7T	C5-3 C6-6 C6-7
A.	Basic Maximum FAR	8.0	10.0	12.0	14.0	15.0
B.	Maximum As-of-Right Floor Area Allowances: —Urban plaza (Section 81-23)	—	1.0[1]	1.0[1]	—	1.0
C.	Maximum FAR with As-of-Right Incentives	8.0	11.0[1]	13.0[1]	14.0	16.0
D.	Maximum Special Permit Floor Area Allowances: (District-Wide Incentives) —Subway station improvement (Section 81-53)	—	2.0[1]	2.4[1]	—	3.0
E.	Maximum Total FAR with District-Wide and As-of-Right Incentives	8.0[2]	12.0[1]	14.4[1]	14.0	18.0[2]
F.	Maximum As-of-Right Floor Area Allowances in Theatre Subdistrict Except in Theatre Subdistrict Core —Theatre retention (Section 81-744) —Through block galleria (Section 81-748)	— —	1.0[1] 1.0[1]	1.0[1] 1.0[1]	— —	1.0 1.0

	Means for Achieving Permitted FAR Levels on a Zoning Lot	MAXIMUM FLOOR AREA RATIO (FAR)				
		C5-P	C6-4 C6-5 M1-6	C5-2.5 C6-4.5 C6-5.5 C6-6.5	C6-7T	C5-3 C6-6 C6-7
G.	Maximum Special Permit Floor Area Allowances in Theatre Subdistrict: —Rehabilitation of listed theatre (Section 81-745)	—	4.4	2.4	2.8	3.0
H.	Maximum Total FAR with Theatre Subdistrict Incentives, District-Wide Incentives and As-of-Right Incentives	8.0[2]	14.4	14.4	16.8	18.0[2]
I.	Maximum FAR of a lot containing non-bonusable landmark (Section 74-711 or As-of-Right)	8.0	10.0	12.0	14.0	15.0
J.	Maximum FAR of a lot containing bonusable landmark (Section 74-712)	—	—	—	—	18.0
K.	Development rights (FAR) of a landmark "granting" lot for transfer purposes [5]	8.0[3]	10.0[3]	13.0[3,4]	14.0[3]	16.0[3]

L.	Maximum amount of transferable development rights (FAR) from landmark zoning lot that may be utilized on an "adjacent" receiving lot [6]	1.6	2.0	2.4	No Limit	No Limit

[1] Not available in Theatre Subdistrict Core.

[2] May be exceeded in the case of *zoning lots* with development rights transferred from landmark sites.

[3] Less the total *floor area* of existing *buildings* on the landmark *zoning lot*.

[4] 12.0 in portion of C6-5.5 District in Theatre Subdistrict Core.

[5] Applicable only where landmark *zoning lot* is separate from "adjacent" receiving lot.

81-212

Special provisions for transfer of development rights from landmark sites

The provisions of Section 74-79 (Transfer of Development Rights from Landmark Sites) shall apply in the *Special Midtown District* subject to the modifications set forth in this Section and Sections 81-254 (Special permit for height and setback modifications), 81-266 (Special permit for height and setback modifications) and 81-747 (Transfer of development rights from landmark theatres).

The provisions of Section 74-79 pertaining to the meaning of the term "adjacent lot" in the case of lots located in C5-3, C5-5, C6-6, C6-7 or C6-9 Districts are modified to apply in the *Special Midtown District* where the "adjacent lot" is in a C5-3, C6-6, C6-7, [C5-3.5,] **C6-5.5,** C6-6.5 or [6-7.5] **C6-7T** District.

The provisions of paragraph 3 of Section 74-792 as applied in the *Special Midtown District* shall be subject to the restrictions set forth in the table in Section 81-211 on the development rights (FAR) of a landmark "granting" lot for transfer purposes.

Wherever there is an inconsistency between any provision in Section 74-79 and the table in Section 81-211, the table in Section 81-211 shall apply.

81-213

Developments or enlargements on landmark sites

The provisions of Section 74-712 (Developments or enlargements on landmark sites in certain districts), are applicable in C5-3, C6-6 **[,]** and C6-7 [, C5-3.5, C6-6.5 and C6-7.5] Districts where such districts are located within the *Special Midtown District* and

* * * *

APPENDIX H

CITY PLANNING COMMISSION
November 5, 1969/Cal. No. 32

CP-20938

IN THE MATTER OF amendments, pursuant to Section 200 of the New York City Charter of the Zoning Resolution of The City of New York, relating to Sections 33-120.5 74-79, 74-791, 74-792 and 74-793 concerning transfer of development rights from landmark sites.

On motion, the following favorable report, as modified, was unanimously adopted:

November 5, 1969.

To Secretary, Board of Estimate from City Planning Commission:

Pursuant to Section 200 of the New York City Charter, the City Planning Commission on October 8, 1969, Cal. No. 13, authorized a public hearing on amendments of the Zoning Resolution of The City of New York, relating to sections 74-79, 74-791, 74-792, and 74-793 concerning the transfer of development rights from a landmark site as follows:

* * * *

The purpose of these amendments is to make available a method of retaining and maintaining landmark buildings which the Landmarks Preservation Commission and the Board of Estimate have designated worthy of preservation. The amendments will provide economic relief to the owner of a landmark building by permitting the transfer of development rights from a landmark site to adjacent lots or to any of a chain of adjacent lots in the same ownership as the landmark site.

A landmark may be located on a lot where the Zoning Resolution would permit a much larger building to be constructed and where intensive development is appropriate and economically desirable. The present use of the land may not represent its economic potential. The amendments will permit an owner of a landmark to realize the value of the land by transferring unused floor area potential to appropriate locations in order to preserve the landmarks.

Any transfer of development rights under these amendments would be subject to the grant of a special permit by the City Planning Commission and the Board of Estimate and would require that safeguards be taken to avoid adverse effects on the character of the surrounding area. The amendment was therefore modified, after the public hearing, to make clear that this amendment is applicable only in C5-3, C5-5, C6-6, C6-7 and C6-9 Districts.

* * * *

APPENDIX I

CITY PLANNING COMMISSION
March 16, 1982/Cal. No. 1

N 820253 ZRM
N 820253 ZRM (A)

Amendment of the Zoning Resolution, pursuant to Section 200 of the New York City Charter, relating to Article VIII, Chapter 1, Section 31-00, and miscellaneous changes in other sections for establishing a Special Midtown District which contains growth, stabilization and preservation areas.

The proposed amendment of the Zoning Resolution and the related amendment of the Zoning Map would establish a Special Midtown District containing growth, stabilization and preservation areas. The amendments are a response to the over-concentration of development that has become a source of deep concern to community boards, civic organizations, the development community and the general public. These amendments are intended to encourage the growth of Midtown to the west and south, and to ease development pressures on its congested, highly-developed East Side core. The major features of the amendments are summarized below.

I. *SUMMARY OF MAJOR FEATURES*

* * * *

4. *Landmark Transfers.* The existing zoning regulations encourage landmark preservation by allowing Landmarks to transfer development rights to adjacent lots. Such transfers may extend through a chain of ownership

to a receiving lot contiguous with or across the street from the landmark granting site. In the highest density commercial Midtown districts, an eligible receiving lot can, regardless of the existing scale of development, accept transfer of any amount of additional density from a landmark. Limits are placed only on the amount that any granting site can transfer. These provisions are all carried forward into the proposed special Midtown District regulations without change.

In Midtown the unused development rights above a landmark which may be transferred are limited by the FAR 18 maximum, consisting of a base FAR 15 plus an FAR 3 plaza bonus, available under the current zoning.

* * * *

APPENDIX J

Grand Central Area

Proposal for a Special Sub-District

Edward I. Koch, Mayor
City of New York

New York Department of City Planning
Sylvia Deutsch, Director
Con Howe, Executive Director

November 1989
NYC DCP #89-45

* * * *

Planning Context

A critical planning and development issue is the potential impact that the use of development rights from Grand Central Terminal could have on the surrounding area. As a designated New York City landmark, the terminal could potentially transfer some or all of its approximately 1,700,000 square feet of unused development rights.[1] The current transfer mechanism, Section 74-79 of the Zoning Resolution, permits transfers to those sites immediately adjacent to the landmark or a chain of ownership. This mechanism was used in 1979 when the City Planning Commission and Board of Estimate approved a special permit for the conveyance of 74,655 square feet of development rights from Grand Central Terminal to the site of the former Airlines Terminal Building on the southwest corner of 42nd Street and Park Avenue to facilitate the construction of the Philip Morris headquarters. The approved special permit allowed for a 447,930 square foot building (21.6 FAR).

In taking a broader view of a potential transfer of development rights from Grand Central Terminal, the following factors must be considered:

- Due to the terminal's relatively low density and large footprint, a substantial amount of development rights is available for transfer.

---

[1] In addition to the terminal building itself, there are four other designated New York City landmarks within a few blocks of the terminal complex: the Helmsley Building between 45th and 46th streets at Park Avenue, the Chrysler Building on the northeast corner of 42nd Street at Lexington Avenue, the Chanin Building on the southwest corner of 42nd Street and Lexington Avenue, and the French Building at 45th Street and Fifth Avenue. All but the terminal building contain more floor area than is now permitted by zoning and therefore do not have any development rights to transfer.

- Current zoning regulations permit development rights to be distributed over an area defined primarily by the terminal's complicated ownership patterns rather than by a plan based upon appropriate planning concerns.
- Currently the 74-79 special permit mechanism does not place a specific limit on the amount of development rights which may be transferred to any one parcel. The amount of transfer permitted is at the discretion of the City Planning Commission and the Board of Estimate in accordance with the required findings of Section 74-792.
- Opportunities to expand Grand Central Terminal's valuable pedestrian circulation network have not been maximized.

Collectively, these circumstances make it clear that the current regulations could lead to an ad hoc series of applications for the transfer of development rights from the terminal under Section 74-79. In order to provide a comprehensive planning framework to govern the transfer of development rights from landmarks, City Planning proposes a new Grand Central Sub-District within the Special Midtown District. The following objectives would be achieved by the plan:

- Formation of a more rational method for distributing development rights.
- Reinforcement of the established character of the Grand Central area.

* * * *

Supreme Court, U.S.
FILED
APR 13 1994
OFFICE OF THE CLERK

(2)

No. 93-1305

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

383 MADISON ASSOCIATES,

Petitioner,

- against -

CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

PAUL A. CROTTY,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 788-1070 or 1010

LEONARD J. KOERNER,*
RONALD E. STERNBERG,
of Counsel.
*Counsel of Record

April 12, 1994.

27 pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the determination of the Appellate Division rests on an independent and adequate state ground, thus depriving this Court of jurisdiction to review that Court's order?

2. Whether the Courts below correctly determined that plaintiff's takings claim is meritless?

3. Whether the Courts below correctly determined that plaintiff's substantive due process claim is meritless?

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No. 93-1305

IN THE
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OCTOBER TERM 1993

383 MADISON ASSOCIATES,

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- against -

CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

Plaintiff, 383 Madison Associates (petitioner herein), incorrectly invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3). As more fully reviewed herein, the decision of the New York Supreme Court, Appellate Division, First Department, is based on an independent and adequate state ground, *i.e.*, that the administrative determination denying plaintiff's application for a special permit was rationally based.

Plaintiff's purported constitutional claims were summarily rejected by the New York Courts. The *nisi prius* Court found them to be "baseless and without merit" (20a).[1] The Appellate Division determined that there are no constitutional issues involved (see, 3a-4a).

The absence of a constitutional basis for the determinations of the New York Courts is confirmed by the orders of the New York Court of Appeals. Plaintiff appealed as of right to the Court of Appeals from the Appellate Division order, alleging, as required by statute, that "there is directly involved the construction of the constitution of the ... United States." New York Civil Practice Law and Rules ("NYCPLR") § 5601(b)(1). "[T]he constitutional question must be a substantial one." H. Cohen and A. Karger, *Powers of the New York Court of Appeals* § 55, at 252 (reprint ed. 1992); *see* Thomas R. Newman, *New York Appellate Practice* § 11.02[3][b].

Upon its *sua sponte* determination of "whether it has subject matter jurisdiction and authority to review" (22[B] New York Code of Rules and Regulations § 500.3), the Court of Appeals dismissed plaintiff's appeal "upon the ground that no substantial constitutional question is directly involved" (47a). Thereafter, the Court denied plaintiff's motion, made pursuant to NYCPLR, section 5602(a)(1)(i), for leave to appeal, upon which motion plaintiff raised the same constitutional questions which it again presents on its certiorari petition (see, 48a).

The New York Courts correctly determined that the denial of plaintiff's application for a special permit does not implicate any questions with constitutional dimensions. Since the determination of the Appellate Division thus rests

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[1] Parenthetical references appearing as "__a" are to pages of the appendix to the petition for a writ of certiorari.

on an independent and adequate state ground, the petition for a writ of certiorari should be denied on the basis of this Court's lack of jurisdiction.

STATEMENT OF THE CASE

A. History

Plaintiff is a limited partnership which owns the parcel of land located at 383-385 Madison Avenue in the New York City borough of Manhattan (R. 13-14, 16).[2] This land is presently occupied by a 13 story office building which is vacant as a result of plaintiff's refusal to renew leases (R. 144, 655-56, 868).

The genesis of this action dates back to plaintiff's decision to utilize the site to construct a 74 story, 1,029 foot high office tower, the fourth tallest building in New York City (R. 655-56, 1724). The proposed tower exceeds by more than two times the as-of-right bulk limitations of the Zoning Resolution of the City of New York ("ZR") for the midtown district in which the site is located (R. 656-57).

Plaintiff seeks to accomplish its goal by utilizing certain transferable development rights ("TDRs") which it has contracted to purchase from The New York and Harlem Railroad Company ("Harlem") (see, R. 15). Harlem is the owner of Grand Central Terminal and the Manhattan property on which it is located (R. 1850). In 1967, the Terminal was designated a landmark (R. 656), a designation which was ultimately sustained by this Court. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104

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[2] Numbers in parentheses preceded by "R." refer to pages of the record on appeal filed in the New York Supreme Court, Appellate Division, First Department.

(1978) ("*Penn Central*"). The unused development rights above the landmarked Terminal were converted into TDRs upon the enactment of section 74-79 of the Zoning Resolution (see, R. 679-80).

Section 74-79 permits the transfer of unused development rights from lots occupied by a landmark to adjacent lots, as that term is defined in the section. The transfer of TDRs off of a sending lot to a receiving lot permits the development of the latter lot beyond the limitations otherwise imposed by the Zoning Resolution (see, R. 656-57). Pursuant to section 74-79, the transfer must be authorized by a special permit granted by defendant New York City Planning Commission ("CPC"). Section 74-792 of the Zoning Resolution sets forth the findings which CPC must make "[a]s a condition of permitting such transfer."

Contending that its lot is one of the potential receiving lots of Terminal TDRs, plaintiff, jointly with Harlem, filed an application for a special permit with CPC (R. 661; see, R. 690-726). The applicants sought permission to transfer approximately 800,000 square feet of TDRs from the Terminal lot to 383-385 Madison Avenue (R. 15-16). The grant of such a permit would enable plaintiff to construct the proposed office tower.

Upon its consideration of the record developed during the statutorily prescribed review of the application, CPC determined that it could not approve the project (35a). In an extensive report, which reviewed the factual and legal history of the application (see, 21a-46a), CPC provided four reasoned bases, each sufficient by itself to defeat the application, for its determination.

CPC determined, first, that the transfer of TDRs to plaintiff's property is not legally possible because the property is not an eligible receiving lot. That is, it is not,

as required by the Zoning Resolution, adjacent to the landmark lot (see, 36a-37a, 44a). CPC concluded that such ineligibility aside, the special permit should otherwise be denied on the basis of the "excessive bulk and density" of the proposed tower (38a; see, 38a-41a). The project's "adverse environmental impacts," CPC also found, were not "sufficiently minimize[d] or avoid[ed]," and "the potential mitigative measures that have been identified are only capable of mitigating a portion of the disclosed adverse impacts" (45a; see, 41a). Finally, CPC concluded that it was not able to make the required finding that plaintiff's application included "a program that will result in the preservation of the landmark" (43a; see, 41a-43a).

B. Proceedings below

In plaintiff's judicial challenge to CPC's determination, the *nisi prius* Court granted defendants' motion for summary judgment dismissing the complaint, finding that the record demonstrated, "in exhaustive and meticulous detail," that "CPC had valid reasons for not issuing the special permit to [plaintiff]" (13a). The Court concluded that CPC's determination "was rational on four separate grounds each of which would have been sufficient reason in itself for denying the permit" (*id.*; see, 13a-20a). With regard to the constitutional issues upon which plaintiff purports to rest its certiorari petition, the Court succinctly noted that they had been "reviewed and found baseless and without merit" (20a).

On plaintiff's appeal to the New York Supreme Court, Appellate Division, First Department, that Court disagreed with the lower Court only to the extent of determining that some of CPC's findings could not be sustained (see, 3a). Since, however, the Appellate Division determined that the findings of the absence of adjacency and excessive bulk were rationally based, it affirmed the denial of the special permit (see, 1a-3a). The Court further found

that plaintiff's constitutional claims were singularly without merit. "[S]ince plaintiff did not have a property right to the grant of a special permit," the Court said, "[its] constitutional claims must be rejected" (3a-4a).

Purportedly pursuant to NYCPLR, section 5601(b)(1), plaintiff filed a notice of appeal as of right to the New York Court of Appeals. However, upon a finding that "no substantial constitutional question is directly involved," that Court dismissed the appeal (47a). Thereafter, pursuant to NYCPLR, section 5602(a)(1)(i), plaintiff moved for leave to appeal to the Court of Appeals, raising the same constitutional issues which it again raises on its certiorari petition. The Court of Appeals denied the motion (see, 48a).

REASONS FOR DENYING THE WRIT

A. The determination of the Appellate Division rests on the independent and adequate state ground that there is a rational basis for the administrative determination denying plaintiff's application for a special permit. This Court, therefore, lacks jurisdiction to review the order of the Appellate Division.

The New York Courts correctly perceived this action to be in the nature of a proceeding pursuant to article 78 of the NYCPLR to review the administrative determination denying plaintiff's special permit application. In this regard, the regulatory scheme of the Zoning Resolution could not be more clear. The transfer of development rights from lots occupied by a landmark may be accomplished only pursuant to a special permit issued by CPC. The grant of such a permit "shall be in accordance with all the regulations set forth" in the relevant sections of the Resolution. ZR § 74-79. Under such circumstances, New York decisional law sets forth, in unmistakable terms, the scope of judicial review of administrative determinations

regarding special permits. Plaintiff's obfuscation and misdirection do not alter the essential nature of its challenge to CPC's denial of its special permit application.

We begin with applicable black-letter law. "Board action refusing to grant a 'special exception' is by definition and in essential character discretionary and not a denial of a right[.]" *Matter of Lemir Realty Corp. v. Larkin*, 11 N.Y.2d 20, 24, 226 N.Y.S.2d 374, 376, 181 N.E.2d 407, 408 (1962) ("*Lemir*"); *accord Matter of Tandem Holding Corp. v. Board of Zoning Appeals*, 43 N.Y.2d 801, 802, 402 N.Y.S.2d 388, 389, 373 N.E.2d 282, 283 (1977) ("*Tandem*") ("Entitlement to a special exception is not a matter of right[.]").

The availability of a special permit (or, exception [*see* 3 Ziegler, *Rathkopf's The Law of Zoning and Planning* § 41.01(4th ed.)]) is conditioned upon the standards in the zoning ordinance which guide the administrative body's consideration of special permit applications, "and compliance with those standards must be shown before any exception can be secured." *Tandem, supra,* 43 N.Y.2d at 802, 402 N.Y.S.2d at 389, 373 N.E.2d at 283; *accord Matter of Cicenia v. Zoning Board of Appeals*, 157 A.D.2d 722, 725, 549 N.Y.S.2d 818, 820 (2d Dept. 1990) ("[S]pecial permits can only be issued by a zoning board upon fulfillment of the conditions mandated in the applicable zoning code.").

The New York courts "do not sit to supervise the discretionary acts of the hundreds of town boards and town zoning boards in this State." *Lemir, supra,* 11 N.Y.2d at 24, 226 N.Y.S.2d at 376, 181 N.E.2d at 409. The zoning authority "must act reasonably," and, if it does so, "the courts may not interfere." *Id.*, 11 N.Y.2d at 26, 226 N.Y.S.2d at 378, 181 N.E.2d at 409-10. Upon "review 'as to reasonableness in an article 78 proceeding'" (*id.*, 11 N.Y.2d at 24, 226 N.Y.S.2d at 376, 181 N.E.2d at 409),

the action of a zoning authority denying a special permit will be sustained if the determination has a "rational basis" in the record (*Brick Hill Construction Corp. v. Zoning Board of Appeals*, 53 N.Y.2d 621, 623, 438 N.Y.S.2d 776, 776, 420 N.E.2d 968, 968 [1981]) and is "neither arbitrary nor capricious." *Matter of EBA Realty Co. v. Galante*, 156 A.D.2d 448, 450, 548 N.Y.S.2d 737, 739 (2d Dept. 1989); *see Tandem, supra,* 43 N.Y.2d at 801-02, 402 N.Y.S.2d at 389, 373 N.E.2d at 283 ("The determination of the board, that petitioner's application did not nor could not ... meet the standards in the ordinance governing the granting of special exceptions, is sufficiently supported in the record.").

In the instant case, CPC's decision to deny plaintiff's special permit application was premised on four separate and independent grounds, each one of which was alone sufficient to support the denial . The *nisi prius* Court determined that all of the reasons assigned by CPC for denying the application were reasonably based. While the Appellate Division found some of those reasons to be inadequate, it nonetheless sustained the denial of the special permit on the ground that other reasons given were rational. *See Matter of Wegmans Enterprises, Inc. v. Lansing,* 72 N.Y.2d 1000, 1001-02, 534 N.Y.S.2d 372, 373, 530 N.E.2d 1292, 1293 (1988) ("Failure to meet any one of the conditions set forth in the ordinance is ... a sufficient basis upon which the zoning authority may deny the permit application[.]").

The Appellate Division properly analyzed the propriety of CPC's action in terms of the rationality of its determination to deny plaintiff's application for a special permit. Since that Court unequivocally rested its determination on an independent and adequate state ground, rejecting plaintiff's suggestion that its challenge to the permit denial has constitutional dimensions, this Court lacks jurisdiction to review the order of the Appellate Division.

B. The Courts below correctly determined that plaintiff's takings claim is meritless.

Even assuming the correctness of plaintiff's conclusory, "cornerstone" statement that it has a property interest in the Terminal TDRs (see, Petition, at 10-13),[3] plaintiff's takings claim, as the Courts below correctly determined, is, nonetheless, without merit. "Ownership" of the TDRs places plaintiff in no different position than any property owner who seeks to utilize the property in a manner which a local zoning ordinance allows only by special permit. As recognized by the Courts below, and as herein demonstrated, plaintiff's challenge is thus to the administrative determination to deny its application for a special permit.[4]

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[3] The contract of sale evidences plaintiff's knowledge of the fact that the Zoning Resolution allows the transfer and use of TDRs only by special permit. As noted by the *nisi prius* Court (see, 17a), the contract explicitly provides that plaintiff may terminate the contract if it is unable to obtain the required special permit (see, R. 296-99). Significantly, Harlem, although it joined in the special permit application, did not join in this challenge to the denial of the permit.

[4] We do not understand plaintiff to be mounting a constitutional challenge to the decision to make utilization of TDRs contingent upon the receipt of a special permit. Such a challenge would, in any event, fail. The use of special permits is a well established technique to control development. *See* 3 Ziegler, *Rathkopf's The Law of Zoning and Planning* § 41.01, at 41-2 (4th ed.) ("The special permit or exception zoning technique has a long history in the land use regulatory process in this country.").

As we herein demonstrate, the remaining questions, *i.e.*, whether the conditions imposed are reasonably related to rational planning goals and whether the determination that the conditions have not been met is reasonable, are questions of state law only.

(continued...)

With respect to its elaborately argued takings claim (which was relegated in the complaint to the third cause of action [see, R. 34-35]), plaintiff does not cite a single case in which the mere denial of a special permit was held to be a taking of private property for public use within the meaning of the Fifth or Fourteenth Amendment. There are no such cases. The government cannot take property if it does not, in the first instance, exist. By definition, a special permit, assuming the stated conditions have been met, allows a property owner to develop private property in a manner in which the applicable zoning ordinance otherwise prohibits. It permits, rather than proscribes, a particular utilization of property. Plaintiff, in short, does not have a "right" to the special permit in question (*see Tandem, supra,* 43 N.Y.2d at 802, 402 N.Y.S.2d at 389, 373 N.E.2d at 283 ["Entitlement to a special exception is not a matter of right[.]"]), and its "unilateral expectation" is not an interest in property which is subject to being "taken."

Plaintiff's reliance on *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), is misplaced. The inapplicability of *Nollan* to the facts of the instant case is so patently obvious that the Courts below were able, quite correctly, summarily to reject plaintiff's constitutional claims. In *Nollan*, this Court's constitutional analysis was prompted by California's effort to exact an easement over private property for the benefit of the public as a condition for issuing a land-use permit. Quite simply, the

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4 (...continued)
Plaintiff's attempt to demonstrate how the Zoning Resolution permit conditions in the instant case constitute a taking (see, Petition, at 13-20) leads to the absurd result of leaving all individual local permit conditions throughout the country, countless in number, vulnerable to constitutional attack. This Court's decisions do not require the courts to engage in such an exercise.

government sought to transfer the use of property from the private to the public domain. This Court analyzed this uncompensated transfer in order to determine whether it violated the Fourteenth Amendment.

The clear implication of *Nollan*, which plaintiff refuses to acknowledge, is that an analysis such as that engaged in by this Court is not appropriate without such a transfer. As herein demonstrated, the denial of a special permit does not effect a transfer of private property. The Courts below thus correctly determined that there is nothing herein upon which to predicate a constitutional violation.[5]

Moreover, plaintiff's takings claim is not now, and never will be, ripe for adjudication. One who advances a regulatory takings claim "must establish that the regulation has in substance 'taken' his property - that is, that the regulation 'goes too far.'" *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) ("*MacDonald*"). In order to determine whether a regulation has gone "too far," a court must know "how far the regulation goes." *Id.* Because of the nature of special permits, the denial of a permit will never go "too far" so as to constitute a taking.

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[5] As noted, a special permit allows a property owner to develop property in a manner otherwise prohibited by a zoning ordinance. It turns takings theory on its head to analyze the government "giving" something in terms reserved for when the government "takes" something.

In this regard, the discussions of special permits in two recognized treatises do not include any references to *Nollan*. *See* 2 Anderson, *New York Zoning Law and Practice*, chap. 24 (3d ed. [August 1993 cum. supp.]); 3 Ziegler, *Rathkopf's The Law of Zoning and Planning*, chap. 41 (4th ed.).

In the instant case, CPC's denial of plaintiff's special permit application for the particular tower in question patently does not foreclose the development of plaintiff's property. Most apparently is this true by virtue of the fact that an as-of-right building occupies the site. Although it is presently vacant solely as a result of business decisions made by plaintiff, the record is barren of evidence that plaintiff cannot earn a reasonable return by utilizing this existing as-of-right building.

Precisely this issue was involved in *Penn Central*, *supra*, 438 U.S. 104, wherein this Court rejected the argument that the landmarking of the Terminal "is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" 438 U.S. at 136. This Court specifically noted that the landmark designation "not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years." *Id.* As a result, this Court concluded, "the law does not interfere with what must be regarded as [appellants'] primary expectation concerning the use of the parcel." *Id.*

Similarly, in the instant case, the discretionary denial of the special permit does not deprive plaintiff of its ability to realize its "primary expectation" to utilize its property in conformity with the Zoning Resolution.[6] *See*

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[6] The analysis in *Penn Central*, in conjunction with the nature of a special permit and the absence of a property interest in its being granted, disposes of any argument that plaintiff has a reasonable investment backed expectation of using the Terminal TDRs at its site. As the text makes clear, plaintiff could reasonably expect, its "primary expectation" in the words of this Court, only to develop its property in conformity with the Zoning Resolution. Its unilateral hope to utilize the Terminal TDRs by obtaining the required special permit can mature into a reasonable

(continued...)

The Rector, Wardens and Members v. City of New York, 914 F.2d 348, 357 (CA2 1990), *cert. denied*, 499 U.S. 905 (1991) (The Court held that the denial of the right to demolish a landmarked building did not, under all of the circumstances, constitute a taking. The "palpable" deprivation of commercial value was not a taking, the Court held, "so long as continued use [of the landmarked structure] is viable."); *Shubert Organization, Inc. v. Landmarks Preservation Commission*, 166 A.D.2d 115, 122, 570 N.Y.S.2d 504, 508 (1st Dept.), *appeal dism'd*, 78 N.Y.2d 1006, 575 N.Y.S.2d 456, 580 N.E.2d 1059, *leave to appeal denied*, 79 N.Y.2d 751, 579 N.Y.S.2d 651, 587 N.E.2d 289 (1991), *cert. denied*, __ U.S. __, 112 S.Ct. 2289, 119 L.Ed.2d 213 (1992) (Rejecting a takings challenge to the landmarking of theatres in New York City, the Court noted, *inter alia*, that "there is no prohibition against petitioners receiving economic benefit from continuing the use of the buildings as theatres.").

Even aside from the question of plaintiff's ability to utilize the site for as-of-right development, plaintiff has not sought permission for any type of modified development utilizing Terminal TDRs. All that has occurred is that plaintiff has been denied a special permit to construct a 74 story office tower. CPC's "rejection of a single development plan is not sufficient to demonstrate that a regulatory takings claim is ripe for decision" (*Sudarsky v. City of New York*, 779 F. Supp. 287, 300 [SDNY 1991], *aff'd*, 969 F.2d 1041 [CA2 1992], *cert. denied*. __ U.S. __, 113 S.Ct. 1059, 122 L.Ed.2d 365 [1993]), because such does not constitute a "final definitive position regarding how

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6 (...continued)
expectation only if plaintiff can satisfy all of the requirements of the Resolution for obtaining the permit. As the Appellate Division correctly determined. CPC rationally concluded that at least some of the required findings could not be made.

[CPC] will apply the regulations at issue to the particular land in question.'" *MacDonald, supra*, 477 U.S. at 351.

That is, since there has been no "conclusive determination as to what development would be allowed on [the] property" (*Sudarsky v. City of New York, supra*, 779 F.Supp. at 300), plaintiff's takings claim is premature. As was true of the appellant in *MacDonald*, plaintiff has been denied the right to utilize its property for only "one intense type" (*MacDonald, supra*, 477 U.S. at 342n.8) of commercial development. There is nothing in the record which indicates that CPC would not be inclined to permit plaintiff to utilize TDRs for a less "intense" development of the property. "Rejection of exceedingly grandiose plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, id.*, 477 U.S. at 353n.9.

Plaintiff's failure to submit an application for a building of less bulk and with fewer environmental impacts, or to seek a variance pursuant to section 72-21 of the Zoning Resolution, precludes it from now asserting a takings claim. *See Penn Central, supra*, 438 U.S. at 136-37 ("While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal.... Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal" [emphasis in original].); *Sudarsky v. City of New York, supra*, 779 F. Supp. at 300-01; *Matter of Parkview Associates v. City of New York*, 71 N.Y.2d 274, 283, 525 N.Y.S.2d 176, 179, 519 N.E.2d 1372, 1375, *appeal dism'd and cert. denied*, 488 U.S. 801 (1988) ("... Parkview's claim that the City's action

constitutes a taking without due process of law or just compensation may not be addressed in this action and at this time because Parkview had failed to apply for a variance[.]"); *Shubert Organization, Inc. v. Landmarks Preservation Commission, supra*, 166 A.D.2d at 122, 570 N.Y.S.2d at 508.

C. The Courts below correctly determined that plaintiff's substantive due process claim is meritless.

"In order to state a substantive due process claim, a party must first establish that he had a valid 'property interest' in a benefit that was entitled to constitutional protection at the time he was deprived of that benefit." *Sudarsky v. City of New York, supra*, 779 F. Supp. at 294; *accord Coyne v. City of Somerville*, 972 F.2d 440, 403 (CA1 1992). "'Property interests flow not from the Constitution itself, but from "existing rules or understandings that stem from an independent source such as state law."'" *Weissman v. Fruchtman*, 765 F. Supp. 1185, 1190 (SDNY 1991), *citing Board of Regents v. Roth*, 408 U.S. 564 (1972).

In the context of a due process claim involving the failure to issue a special permit, "an entitlement analysis [is utilized] to determine whether a party's interest in the permit's issuance is protectible under the Fourteenth Amendment." *Sudarsky v. City of New York, supra*, 779 F. Supp. at 294. Upon such an analysis, "the proper inquiry is 'whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the [permit] application would have been granted.'" *Natale v. Town v. Ridgefield*, 927 F.2d 101, 105 (CA2 1991).

Application of that test "must focus on the degree of discretion enjoyed by the issuing authority" to grant or deny the permit in question. *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (CA2), *cert.*

denied, 493 U.S. 893 (1989); *see Dean Tarry Corporation v. Friedlander* 826 F.2d 210 (CA2 1987); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (CA2 1985). Given this focus, "the question of whether an applicant has a property interest will normally be a matter of law for the court." *RRI Realty Corp. v. Incorporated Village of Southampton*, supra, 870 F.2d at 918.

The Courts below correctly concluded that plaintiff's substantive due process claim is meritless. Under applicable New York law, the special permit sought by plaintiff is not a property interest which is entitled to constitutional protection. As fully reviewed herein, the decision whether to grant a special permit is a quintessential discretionary act. In reviewing the evidence in order to determine whether an applicant has met the conditions for granting a special permit, a zoning authority applies its "discretion and commonsense judgments." *Matter of Market Square Properties, Ltd. v. Town of Guilderland Zoning Board of Appeals*, 66 N.Y.2d 893, 895, 498 N.Y.S.2d 772, 772, 489 N.E.2d 741, 741 (1985). As noted, "[b]oard action refusing to grant 'a special exception' is by definition and in essential character discretionary and not a denial of a right[.]" *Lemir, supra*, 11 N.Y.2d at 24, 226 N.Y.S2d at 376, 181 N.E.2d at 408.

In the instant case, CPC had wide discretion to consider plaintiff's special permit application in light of the findings which it is required to make pursuant to sections 74-79 and 74-792(5) of the Zoning Resolution. "This wide discretion prevented [plaintiff's] expectation of success from rising to the level of a property right meriting protection under the ... Fourteenth Amendment[]." *Dean Tarry Corporation v. Friedlander, supra*, 210 F.2d at 213. Plaintiff's substantive due process claim thus "amounts to an attempt to manufacture an entitlement from a unilateral expectancy that [its] project could be approved." *Sudarsky v. City of New York, supra*, 779 F. Supp. at 297; *see*

Maybee v. Town of Newfield, 789 F. Supp. 86, 91 (NDNY 1992) ("At most [plaintiffs] have a unilateral expectancy which does not constitute a protected property interest."). Plaintiff's claim, therefore, was correctly rejected by the Courts below.

Finally, even assuming that plaintiff, as it claims, has a property interest, its substantive due process claim must nonetheless fail. "In cases involving zoning disputes, substantive due process entitles property owners to be free from arbitrary or irrational action." *Sudarsky v. City of New York, supra*, 779 F. Supp. at 296. Applying facts and law unreviewable by this Court, the Courts below correctly determined that CPC's denial of plaintiff's application for a special permit was reasonable and not arbitrary and capricious (see, 2a-3a, 13a-20a). It follows that since plaintiff has obtained everything to which it is entitled and would thus gain nothing from a resolution of any "disharmony among the circuits" (Pet., at 22) which may exist, the issue is not appropriately addressed in this action.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

PAUL A. CROTTY,
Corporation Counsel of the
City of New York,
Attorney for Respondents.

LEONARD J. KOERNER,*
RONALD E. STERNBERG,
of Counsel.

*Counsel of Record